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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 54

THE UNITED STATES OF AMERICA, Petitioner

vs.

JOSEPH RUZICKA AND CHARLES RUZICKA, INDIVIDUALLY, AND AS CO-PARTNERS TRADING AS SEELEY DAIRY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1946

CERTIORARI GRANTED APRIL 22, 1946

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8759

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOSEPH RUZICKA AND CHARLES RUZICKA,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

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3 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the third Monday of December (it being the 18th day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Four and of the Independence of the United States of America the 169th year. Placita

Present:

Hon. John P. Barnes, District Judge.
Hon. Philip L. Sullivan, District Judge.
Hon. Michael L. Igoe, District Judge.
Hon. William J. Campbell, District Judge.
Hon. Walter J. LaBuy, District Judge.
Hon. Elwyn R. Shaw, District Judge.
Hon. William H. Holly, District Judge.

Roy H. Johnson, Clerk.
William H. McDonnell, Marshal.

Friday, October 16, 1944.
Court met pursuant to adjournment.

Present:

Honorable Michael L. Igoe, Trial Judge.

Placita 4 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the Third Monday of December (it being the 18th day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-four and of the Independence of the United States of America the 169th year.

Present:

Hon. John P. Barnes, District Judge.
Hon. Philip L. Sullivan, District Judge.
Hon. Michael L. Igoe, District Judge.
Hon. William J. Campbell, District Judge.
Hon. Walter J. LaBuy, District Judge.
Hon. Elwyn R. Shaw, District Judge.
Hon. William H. Holly, District Judge.

Roy H. Johnson, Clerk.
William H. McDonnell, Marshal.

Friday, October 20, 1944.
Court met pursuant to adjournment.

Present:

Honorable Michael L. Igoe, Trial Judge.

5 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Sept. 15, 1942
Northern District of Illinois
Eastern Division

United States of America
vs.
Joseph Ruzicka, Frank Ruzicka and Charles Ruzicka, individually and as co-partners, doing business under the trade name of Seeley Dairy. } Civil Action No. 4670

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the Fifteenth day of September, A.D. 1942.

6 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—Civil Action No. 4670)

COMPLAINT.

Plaintiff, by J. Albert Woll, United States Attorney in and for the Northern District of Illinois, acting under the direction of the Attorney General, upon request of the Secretary of Agriculture of the United States, brings this action under Title 7, U. S. C. A., Section 608a(6); Section 8a(6) of the Act of May 12, 1933 (48 Stat. 31), as amended May 9, 1934 (48 Stat. 670, 675), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) (The said Act of May 12, 1933, as reenacted and amended, Title 7, U. S. C. A., Section 601 *et seq.*, being hereinafter referred to as the "act"), vesting the several district courts of the United States with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order issued by the Secretary of Agriculture of the United States pursuant to the provisions of Title I of said act, and alleges:

7

II.

The defendants, Joseph Ruzicka, Frank Ruzicka and Charles Ruzicka, are inhabitants of the City of Chicago, County of Cook, State of Illinois, and are, and at all times herein mentioned were, copartners doing business under the trade name of Seeley Dairy, with their principal place of business at 4754 South Seeley Avenue, Chicago, Illinois.

III.

This proceeding is brought to enforce the provisions of Order No. 41, Order No. 41, as amended, effective July 1, 1940, Order No. 41, as amended, effective July 1, 1941, and Order No. 41, as amended, effective July 1, 1941, and as further amended by Amendment No. 1, effective September 6, 1941, issued by the Secretary of Agriculture of the United States (hereinafter called the "Secretary"), regulating such handling of milk in the Chicago, Illinois, marketing area (hereinafter referred to as the "marketing area"), as is in the current of interstate commerce, or as directly burdens, obstructs, or affects interstate commerce in milk or its products, and to prevent and restrain the defendants from handling milk or its products in violation of the provisions of said Order No. 41, as amended, effective July 1, 1941, and as further amended by Amendment No. 1, effective September 6, 1941.

IV.

Order No. 41 was issued by the Secretary on August 28, 1939, and was published in the Federal Register on August 30, 1939 (4 Fed. Reg. 3764). Order No. 41 became effective September 1, 1939. A true and complete copy of Order No. 41, as issued August 28, 1939, is attached hereto marked "Exhibit 'A'" and made a part hereof. Order No. 41 as amended, effective July 1, 1940, was issued by the Secretary on June 21, 1940, and was published in the Federal Register on June 25, 1940 (5 Fed. Reg. 2337). A true and complete copy of Order No. 41, amended, effective July 1, 1940,
8 is attached hereto marked "Exhibit 'B'" and made a part hereof. Order No. 41, as amended, effective July 1, 1941, was issued by the Secretary on June 27, 1941, and was published in the Federal Register on June 28, 1941 (6 Fed. Reg. 3130). A true and complete copy of Order No. 41, as amended, effective July 1, 1941, is attached hereto marked "Exhibit 'C'" and made a part hereof. Amendment No. 1, effective September 6, 1941, to Order No. 41,

as amended, effective July 1, 1941, was issued by the Secretary on August 29, 1941, and was published in the Federal Register on September 4, 1941 (6 Fed. Reg. 4552). A true and complete copy of Amendment No. 1, effective September 6, 1941, to Order No. 41, as amended, effective July 1, 1941, is attached hereto marked "Exhibit 'D'" and made a part hereof. Order No. 41 was in full force and effect from September 1, 1939, through June 30, 1940; Order No. 41, as amended, effective July 1, 1940, was in full force and effect from July 1, 1940, through June 30, 1941; Order No. 41, as amended, effective July 1, 1941 was in full force and effect from July 1, 1941, through September 5, 1941; and order No. 41, as amended, effective July 1, 1941, and as further amended by Amendment No. 1, effective September 6, 1941, is now and has been in full force and effect since September 6, 1941.

V.

The defendants are now, and at all times hereinafter mentioned were, engaged in purchasing or receiving milk from producers, associations of producers, other handlers, persons producing milk not qualified to be received at an approved plant, or persons operating an unapproved plant, and disposing of such milk, or a portion thereof, as Class I milk or as Class II milk (as such terms are defined in Order No. 41, as originally issued and subsequently amended) in the marketing area in competition with other handlers subject to such order. The defendants are, and have been at all times mentioned herein, engaged in such handling of milk or cream therefrom as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce in milk and its products, and are handlers of milk as defined in section 8c(1) of the Act; section 941.1(a)(4) of Order No. 41; and section 941.1(a)(5) of Order No. 41, as subsequently amended.

VI.

Section 941.8(e) of Order No. 41, and section 941.8(g) of Order No. 41, as subsequently amended, provide that whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund, the market administrator shall promptly bill such handler for any unpaid amount, and such handler shall within five days make payment to the market administrator of the amount

so billed. Such errors in payments made by the defendant to the producer-settlement fund for the delivery periods commencing September 1, 1939, and ending April 30, 1942, have been disclosed by an audit of the defendants' books and records, and the market administrator has billed the defendants for the amount necessary to adjust the defendants' account with the producer-settlement fund. The defendants, in violation of Order No. 41, as originally issued and subsequently amended, have failed and refused to make payment of the amounts for which the defendants were so billed; and as of July 28, 1942, the defendants owe to the market administrator for adjustment of errors disclosed in defendants' account with the producer-settlement fund the sum of $8,182.90.

Wherefore, Plaintiff Demands:

1. That the Court issue a mandatory injunction commanding the defendants to comply fully with all of the provisions of Order No. 41 as originally issued and subsequently amended, and particularly to make all payments now due and owing to the market administrator;

2. That the Court issue a permanent injunction enjoining and commanding the defendants, and each of them, their agents, attorneys, employees, and assigns, and all persons acting in concert with them, or under them, or in their behalf, or claiming so to act, from violating any of the provisions of Order No. 41, as amended, effective July 1, 1941, and as further amended by Amendment No. 1, effective September 6, 1941, regulating the handling of milk in the Chicago, Illinois, marketing area;

3. That the plaintiff be given all such other, further, and different relief as the Court may deem just and proper.

United States of America,
By J. Albert Woll,
J. Albert Woll,
United States Attorney,
Chicago, Illinois.

OK Lewis

John S. L. Yost,
John S. L. Yost, Special Assistant
to the Attorney General,
United States Department of Justice,
Washington, D. C.

G. Osmond Hyde,
G. Osmond Hyde, Senior Attorney,
United States Department of Agriculture,
Washington, D. C.

11 District of Columbia }
City of Washington } ss.

Paul L. Miller, being first duly sworn, deposes and says that he is Principal Agricultural Economist, Dairy and Poultry Branch, Agricultural Marketing Administration, United States Department of Agriculture, and that he makes this affidavit in behalf of the plaintiff in the foregoing complaint; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein stated on information and belief and as to those matters he believes them to be true. Paul L. Miller.

Subscribed and sworn to before me, a notary public, in and for the District of Columbia, this 31 day of August, 1942. Irene M. Smoot,
(Seal) Notary Public.

My Commission Expires September 1, 1943.

EXHIBIT "A".

0-41 Issued August 28, 1939

UNITED STATES DEPARTMENT OF AGRICULTURE

DIVISION OF MARKETING AND MARKETING AGREEMENTS

T. 7, Ch. IX, Code of Fed. Regs.

Marketing Orders—Part 941

ORDER REGULATING THE HANDLING OF MILK IN THE CHICAGO, ILLINOIS, MARKETING AREA[1]

CONTENTS

Sec. 941.0 Findings.
941.1 Definitions.
941.2 Market administrator.

[1] Section 941.0 to and including Section 941.13 issued under the authority contained in 48 Stat. 31 (1933), 7 U. S. C. 601 et seq. (1934); 49 Stat. 750 (1935); 50 Stat. 246 (1937), 7 U. S. C. 601 et seq. (Sup. IV, 1938).

941.3 Reports of handlers.
941.4 Classification of milk.
941.5 Minimum prices.
941.6 Application of provisions.
941.7 Determination of uniform prices to producers.
941.8 Payment for milk.
941.9 Expense of administration.
941.10 Marketing services.
941.11 Market advisory committee.
941.12 Effective time, suspension, or termination of order.
941.13 Liability.

Whereas, under the terms and provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, (50 Stat. 246) the Secretary of Agriculture of the United States is empowered, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in such handling of any agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, under the terms and provisions of said act, the Secretary of Agriculture is empowered to issue orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of section 8c, such orders to regulate only such handling of such agricultural commodity or product thereof as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, the Secretary of Agriculture, having reason to believe that the execution of a marketing agreement and the issuance of an order with respect to the handling of milk in the Chicago, Illinois, marketing area would tend to effectuate the declared policy of said act, gave, on the 9th day of June 1939, notice of a public hearing which was held at Chicago, Illinois, from June 26 through June 30, 1939, at which time and place all interested parties were afforded an opportunity to be heard on a proposed marketing agreement and a proposed order; and

Whereas, after such hearing and after the tentative approval on the 18th day of August 1939, by the Secretary, of marketing agreement, handlers of more than fifty percent of the volume of milk covered by such order which was marketed within the Chicago, Illinois, marketing area, as defined in this order, refused or failed to sign such tentatively approved marketing agreement relating to milk; and

Whereas, the Secretary determined, on the 24th day of August 1939, said determination being approved by the President of the United States on the 26th day of August 1939, that said refusal or failure tends to prevent the effectuation of the declared policy of said act, that the issuance of this order is the only practical means, pursuant to such policy, of advancing the interests of producers of milk in said area, and that this order is approved or favored by over 67 percent of the producers voting in a referendum conducted by the Secretary, who, during the month of April 1939, said month having been determined by the Secretary to be a representative period, were engaged in the production of milk for sale in the Chicago, Illinois, marketing area; and

Whereas, the Secretary has found and proclaimed the period August 1919-July 1929 to be the base period to be used in determining the purchasing power of milk sold in the Chicago, Illinois, marketing area; and

Whereas, the Secretary herewith finds that a pro-rata assessment on handlers, as set forth in Section 9 of this order, at a rate not to exceed 2 cents per hundredweight on all milk received from producers during each delivery period, will provide funds necessary to pay such expenses, while such order is in effect, as will necessarily be incurred by the market administrator under such order for the maintenance and functioning of said market administrator; and

Section 941.0 *Findings.* Whereas, the Secretary finds upon the evidence introduced at said public hearing:

1. That all milk which was produced for sale in the marketing area is handled in the current of interstate commerce, or so as directly to burden, obstruct, or affect interstate commerce in milk or its products;

2. That the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to sections 2 and 8e of said act, are not reasonable

in view of the price of feeds, the available supplies of feed, and other economic conditions which affect market supply of and demand for such milk, and that the minimum prices set forth in this order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

3. That this order regulates the handling of milk in the same manner as, and is applicable only to handlers defined in the marketing agreement upon which hearings have been held; and

4. That orderly marketing conditions for milk flowing into the Chicago, Illinois, marketing area are so disrupted as to result in the impairment of the purchasing power of such milk and that the issuance of this order, and all of its terms and conditions, will tend to effectuate the declared policy of the act.

Now, Therefore, the Secretary of Agriculture, pursuant to the powers conferred upon him by Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, hereby orders that such handling of milk in the Chicago, Illinois, marketing area as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce, shall, from the effective date hereof, conform to and be in compliance with the following terms and conditions:

Sec. 941.1 *Definitions.* (a) TERMS. The following terms as used herein shall have the following meanings:

(1) The term "Chicago, Illinois, marketing area," hereinafter called the "marketing area," means the territory within the corporate limits of the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka, and Glencoe, all in the State of Illinois.

(2) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(3) The term "producer" means any person who produces milk which is received by a handler at a plant which is approved by any health authority for the receiving of milk for sale in the marketing area, or who produces milk which, upon proof furnished satisfactory to the market administrator, is qualified to be received at such plant.

(4) The term "handler" means any person who, on his own behalf or on behalf of others, purchases or receives milk from producers, associations of producers, or other handlers, all, or a portion, of which milk is disposed of

as milk or cream in the marketing area; and who, on his own behalf or on behalf of others engages in such handling of milk, or cream therefrom, as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products. This definition shall be deemed to include any cooperative association or handler with respect to the milk of any producer which it causes to be delivered to a plant from which no milk or cream is disposed of in the marketing area, for the account of such cooperative association or handler, and for which such cooperative association or handler collects payments.

(5) The term "market administrator" means the agency which is described in Sec. 941.2 for the administration hereof.

(6) The term "delivery period" means the current marketing period from the first to the last day of each month, both inclusive.

(7) The term "cooperative association" means any cooperative association of producers which the Secretary determines (a) to have its entire activities under the control of its members, and (b) to have and to be exercising full authority in the sale of milk of its members.

(8) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

(9) The term "Secretary" means the Secretary of Agriculture of the United States.

Sec. 941.2 *Market administrator.* (a) DESIGNATION. The agency for the administration hereof shall be a market administrator who shall be a person selected by the Secretary. Such person shall be entitled to such compensation as may be determined by, and shall be subject to removal at the discretion of, the Secretary.

(b) POWERS. The market administrator shall:

(1) Administer the terms and provisions hereof; and

(2) Report to the Secretary complaints of violation of the provisions hereof.

(c) DUTIES. The market administrator shall:

(1) Within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

(2) Pay, out of the funds provided by Sec. 941.9, the cost of his bond, his own compensation, and all other expenses necessarily incurred in the maintenance and functioning of his office.

(3) Keep such books and records as will clearly reflect the transactions provided for herein; and surrender the same to his successor or to such other person as the Secretary may designate.

(4) Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 4 days after the date upon which he is required to perform such acts, has not (a) made reports pursuant to Sec. 941.3 or (b) made payments pursuant to Sec. 941.8.

(5) Promptly verify the information contained in the reports submitted by handlers.

Sec. 941.3 *Reports of handlers.* (a) SUBMISSION OF REPORTS. Each handler shall report to the market administrator, in the detail and on forms prescribed by the market administrator, as follows:

(1) On or before the 7th day after the end of each delivery period (a) the receipts of milk at each plant from producers, (b) the receipts of milk at each plant from handlers, (c) the receipts at each plant of the milk, if any, produced by him, (d) the utilization of all receipts of milk for the delivery period, and (e) the name and address of each new producer.

(2) Within 10 days after the market administrator's request with respect to any producer for whom such information is not in the files of the market administrator and with respect to a period or periods of time designated by the market administrator (a) the name and address, (b) the total pounds of milk delivered, (c) the average butterfat test of milk delivered, and (d) the number of days upon which deliveries were made.

(3) On or before the 20th day after the end of each delivery period, his producer pay roll, which shall show for each producer (a) the total delivery of milk with the average butterfat test thereof, (b) the net amount of payment to such producer made pursuant to Sec. 941.8, and (c) any deductions and charges made by the handler.

(4) On or before the 7th day after the end of such delivery period, the sale or disposition of milk outside the marketing area, pursuant to Sec. 941.5 (c) as follows:

(a) the amount and the utilization of such milk, (b) the butterfat test thereof, (c) the date of such sale or disposition, (d) the point of use, (e) the plant from which such milk is shipped, and (f) such other information with respect thereto as the market administrator may require.

(b) VERIFICATION OF REPORTS. Each handler shall make available to the market administrator or his agent (1) those records which are necessary for the verification of the information contained in the reports submitted in accordance with this section, and (2) those facilities necessary for the checking of the weighing and sampling of milk and for determining the utilization of milk by the handler.

Sec. 941.4 *Classification of milk.* (a) BASIS OF CLASSIFICATION. All milk purchased or received by a handler from producers, associations of producers, and other handlers, including milk produced by him, if any, shall be classified by the market administrator in the classes set forth in paragraph (b) of this section.

(b) CLASSES OF UTILIZATION. The classes of utilization of milk shall be as follows:

(1) Class I milk shall be all milk disposed of in the form of fluid milk, and all milk not accounted for as Class II milk or Class III milk.

(2) Class II milk shall be all milk, except skimmed milk, disposed of in the form of flavored milk and flavored milk drinks, all milk used to produce cottage cheese, and all milk used to produce cream which is disposed of in the form of cream (for consumption as cream), ice cream, and ice cream mix.

(3) Class III milk shall be all milk used to produce a milk product other than one of those specified in Class II, and all milk accounted for as actual plant shrinkage, but not to exceed 2 percent of the total receipts of milk from producers.

(c) INTERHANDLER AND NONHANDLER SALES. Milk disposed of by a handler to another handler, and milk disposed of by a handler to a person who is not a handler but who distributes milk or manufactures milk products shall be classified as Class I milk: Provided, That if the selling handler on or before the 7th day after the end of the delivery period furnishes to the market administrator a statement which is signed by the buyer and seller that

such milk was disposed of as Class II milk or Class III milk, such milk shall be classified accordingly, subject to verification by the market administrator.

Sec. 941.5 *Minimum prices.* (a) CLASS PRICES. Except as set forth in paragraph (c) of this section and subject to the location adjustment set forth in paragraph (b) of this section, each handler shall pay, at the time and in the manner set forth in Sec. 941.8, for milk purchased or received from producers by such handler at any plant, platform, or loading station located not more than 70 miles from the City Hall in Chicago, not less than the following prices:

Class I milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content computed pursuant to the formula as set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any, 70 cents per hundredweight for the months of July, August, September, October, and November; 55 cents per hundredweight for the months of December, January, February, March, and April; and 45 cents per hundredweight for the months of May and June: Provided, That with respect to Class I milk disposed of under a program approved by the Secretary for the sale or disposition of milk to low-income consumers, including persons on relief, the price shall be $1.395 per hundredweight.

Class II milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content computed pursuant to the formula as set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any, 32 cents per hundredweight for the months of July, August, September, October, and November; 28 cents per hundredweight for the months of December, January, February, March, and April; and 25 cents per hundredweight for the months of May and June.

Class III milk—Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which such milk was received, and add 20 percent: Provided, That in the event Class III milk is used to produce evaporated or condensed milk handlers shall pay a price per hundredweight computed pursuant to the formula set forth in

section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any.

(b) LOCATION ADJUSTMENTS TO HANDLERS. With respect to milk purchased or received from producers at a plant, platform, or loading station located more than 70 miles from the City Hall in Chicago, which is classified as Class I milk and as Class II milk (and transported to any point within such 70-mile zone), there shall be deducted 2 cents per hundredweight and ½ cent per hundredweight, respectively, for each additional 15 miles or part thereof that such plant, platform, or loading station is located in excess of 70 miles from the City Hall in Chicago. There shall be no location adjustment to handlers with respect to Class III milk. For the purposes of this paragraph Class I milk shall be considered to be that milk received from producers at plants, platforms, or loading stations located nearest the marketing area from which whole milk is shipped to the marketing area.

(c) SALES OUTSIDE THE MARKETING AREA. The price to be paid by a handler for Class I milk disposed of outside the marketing area, in lieu of the price otherwise applicable pursuant to this section, shall be the price, as ascertained by the market administrator, which is being paid in the market where such milk is disposed of, for milk of equivalent use: Provided, That in the event such Class I milk is disposed of outside the 70-mile zone from a plant at which milk is received from producers and which is located more than 70 miles from the City Hall in Chicago, such price as ascertained by the market administrator shall be adjusted by an amount equal to the carload freight rate approved by the Interstate Commerce Commission for the movement of milk in 40-quart cans from the shipping point for the plant where such milk is received from producers to the railroad delivery point serving the market where such milk is utilized as Class I milk.

Sec. 941.6 *Application of provisions.* (a) HANDLERS WHO ARE ALSO PRODUCERS. (1) No provision hereof shall apply to a handler who is also a producer and who purchases or receives no milk from producers or an association of producers, except that such handler shall make reports to the market administrator at such time and in such manner as the market administrator may request.

(2) In the case of a handler who is also a producer and who purchases or receives milk from producers or an association of producers, the market administrator, before making the computations set forth in Sec. 941.7, shall (a) exclude the milk purchased or received by him in each class from other handlers, (b) exclude from his remaining Class I milk and Class II milk up to but not exceeding 95 percent of the quantity of milk produced and disposed of by him, and (c) exclude from his remaining Class III milk the balance of the milk produced and disposed of by him.

(3) The market administrator, in computing the value of milk for any handler pursuant to Sec. 941.7, shall consider as Class III milk any milk or cream received in bulk by such handler from a handler who distributes part of his own production. If the receiving handler disposes of such milk or cream for other than Class III purposes, the market administrator shall add to the total value computed pursuant to Sec. 941.7 the difference between (a) the value of such milk or cream at the Class III price and (b) the value according to its actual usage.

Sec. 941.7 *Determination of uniform prices to producers.* (a) COMPUTATION OF VALUE OF MILK FOR EACH HANDLER. For each delivery period the market administrator shall compute, subject to the provisions of Sec. 941.6, the value of milk for each handler which was purchased or received from producers by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to Sec. 941.5, and (b) adding together the resulting values of each class.

(b) COMPUTATION AND ANNOUNCEMENT OF UNIFORM PRICES. The market administrator shall compute and announce the uniform price per hundredweight of milk for each delivery period in the following manner:

(1) Combine into one total the respective values of milk computed pursuant to paragraph (a) of this section, for each handler who made the reports pursuant to Sec. 941.3 (a) for such delivery period;

(2) Add the amount of the location differentials applicable pursuant to Sec. 941.8 (g);

(3) Add the amount of cash balance in the producer-settlement fund;

(4) Divide by the total quantity of milk represented in the computations pursuant to paragraph (a) of this section;

(5) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in the producer-settlement fund; and

(6) On or before the 12th day after the end of each delivery period mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the act, (b) the blended price per hundredweight which is the result of these computations, and (c) the price of Class I milk, Class II milk, and Class III milk used in such computations.

Sec. 941.8 *Payment for milk.* (a) TIME AND METHOD OF PAYMENT. On or before the 15th day after the end of each delivery period each handler shall pay each producer, for milk purchased or received during the delivery period, an amount of money representing not less than the total value of such milk, at the uniform price per hundredweight, computed pursuant to Sec. 941.7 (b) and subject to the butterfat differential and location adjustments set forth in this section.

(b) PRODUCER-SETTLEMENT FUND. The market administrator shall establish and maintain a separate fund known as "the producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to paragraphs (c) and (e) and out of which he shall make all payments to handlers pursuant to paragraphs (d) and (e) of this section.

(c) PAYMENTS TO THE PRODUCER-SETTLEMENT FUND. On or before the 14th day after the end of each delivery period each handler shall pay to the market administrator the amount by which the total value of the milk purchased or received by him from producers during the delivery period is greater than the amount obtained by multiplying the hundredweight of milk purchased and received from producers by the uniform price.

(d) PAYMENTS OUT OF THE PRODUCER-SETTLEMENT FUND. On or before the 15th day after the end of each delivery period, the market administrator shall pay to each handler for payment to producers the amount, if any, by which the total value of such milk purchased or received from producers by such handler is less than the amount obtained by multiplying the hundredweight of such milk purchased or received from producers by such handler by the uniform price. If at such time the balance in the

producer-settlement fund is insufficient to make all payments pursuant to this paragraph, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available. No handler who, on the 15th day after the end of each delivery period, has not received the balance of the payment due him from the market administrator shall be deemed to be in violation of paragraph (a) of this section if he reduces his payments to producers by not more than the amount of the reduction in payment from the producer-settlement fund.

(e) ADJUSTMENTS OF ERRORS IN PAYMENTS. Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund pursuant to paragraph (c) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer, for milk purchased or received by such handler, discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

(f) BUTTERFAT DIFFERENTIAL. If any handler has purchased or received from any producer, during any delivery period, milk having an average butterfat content other than 3.5 percent, such handler, in making the payments pursuant to paragraph (a) of this section to such producer, shall add for each one-tenth of 1 percent of average butterfat content above 3.5 percent not less than, or shall deduct for each one-tenth of 1 percent of average butterfat content below 3.5 percent not more than, 4 cents per hundredweight.

(g) LOCATION ADJUSTMENTS TO PRODUCERS. In making payments to producers pursuant to paragraph (e) of this section, handlers shall deduct with respect to all milk purchased or received from producers at a country plant,

platform, or loading station located more than 70 miles from the City Hall in Chicago, the amount specified as follows:

Within 70 to 85 miles	2 cents per hundredweight.
Within 86 to 100 miles	4 cents per hundredweight.
Within 101 to 115 miles	6 cents per hundredweight.
Within 116 to 130 miles	8 cents per hundredweight.
Within 131 to 145 miles	10 cents per hundredweight.
Within 146 to 160 miles	12 cents per hundredweight.
Within 161 to 175 miles	14 cents per hundredweight.
For each 15 miles or part thereof beyond 176 miles from the City Hall of Chicago, an additional	½ cent per hundredweight.

Sec. 941.9 *Expense of administration.* (a) PAYMENTS BY HANDLERS. As his pro-rata share of the expense of the administration hereof each handler, except those handlers exempt from the provisions hereof as set forth in Sec. 941.6 (a), shall pay to the market administrator, on or before the 15th day after the end of each delivery period, a sum not exceeding 2 cents per hundredweight with respect to all milk purchased or received by him during such delivery period from producers, or produced by him, the exact sum to be determined by the market administrator, subject to review by the Secretary: Provided, That each handler which is a cooperative association shall pay such pro-rata share of expense of administration only on that milk of producers actually received at a plant of such cooperative association, or caused to be delivered by such cooperative association to a plant from which no milk or cream is disposed of in the marketing area.

(b) SUITS BY MARKET ADMINISTRATOR. The market administrator may maintain a suit in his own name against any handler for the collection of such handler's pro-rata share of expense set forth in this section.

Sec. 941.10 *Marketing services.* (a) MARKETING SERVICE DEDUCTION. In making payments to producers pursuant to Sec. 941.8, each handler, with respect to all milk received from each producer during each delivery period, except as set forth in paragraph (b) of this section, shall deduct 3 cents per hundredweight, or such lesser amount as the market administrator shall determine to be sufficient, such determination to be subject to review by the Secretary,

and shall, on or before the 15th day after the end of such delivery period, pay such deductions to the market administrator. Such moneys shall be expended by the market administrator for verification of weights, samples, and tests of milk received from such producers and in providing for market information to such producers. The market administrator may contract with an association or associations of producers for the furnishing of the whole or any part of such services to, or with respect to the milk received from, such producers.

(b) MARKETING SERVICE DEDUCTIONS WITH RESPECT TO MEMBERS OF A PRODUCERS' COOPERATIVE ASSOCIATION. In the case of producers for whom a cooperative association is actually performing the services set forth in paragraph (a) of this section each handler shall, in lieu of the deductions specified in paragraph (a) of this section, make such deductions from payments made pursuant to Sec. 941.8 as may be authorized by such producers, and pay over on or before the 15th day after the end of each delivery period such deductions to the associations rendering such service of which such producers are members.

Sec. 941.11 *Market advisory committee.* (a) Subsequent to the effective date hereof, the market administrator may select a representative committee of the industry for purposes (1) of recommendation of amendments to this order, and (2) for conferences, counsel, and advice.

Sec. 941.12 *Effective time, suspension, or termination of order.* (a) EFFECTIVE TIME. The provisions hereof, or any amendment hereto, shall become effective at such time as the Secretary may declare and shall continue in force until suspended, or terminated, pursuant to paragraph (b) of this section.

(b) SUSPENSION OR TERMINATION OF ORDER. The Secretary may suspend or terminate this order or any provision hereof whenever he finds that this order or any provision hereof obstructs or does not tend to effectuate the declared policy of the act. This order shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

(c) CONTINUING POWER AND DUTY OF THE MARKET ADMINISTRATOR. If upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which

requires further acts by any handler, by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination: Provided, That any such acts required to be performed by the market administrator shall, if the Secretary so directs, be performed by such other person, persons, or agency as the Secretary may designate.

(1) The market administrator, or such other person as the Secretary may designate, shall (a) continue in such capacity until removed by the Secretary, (b) from time to time account for all receipts and disbursements, and when so directed by the Secretary deliver all funds on hand, together with the books and records of the market administrator or such person, to such person as the Secretary shall direct, and (c) if so directed by the Secretary execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator or such person pursuant thereto.

(d) LIQUIDATION AFTER SUSPENSION OR TERMINATION. Upon the suspension or termination of any or all provisions hereof the market administrator, or such person as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid or owing at the time of such suspension or termination. Any funds collected pursuant to the provisions hereof, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator or such person in liquidating and distributing such funds, shall be distributed to the contributing handlers and producers in an equitable manner.

Sec. 941.13 *Liability.* (a) LIABILITY OF HANDLERS. The liability of the handlers hereunder is several and not joint, and no handler shall be liable for the default of any other handler.

Now, Therefore, Harry L. Brown, Acting Secretary of Agriculture, acting under the provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, for the purposes and within the limitations there-

in contained and not otherwise, hereby executes and issues in duplicate this order, under his hand and the official seal of the Department of Agriculture, in the city of Washington, District of Columbia, on this 28th day of August 1939, and declares this order to be effective on and after the 1st day of September 1939.

Harry L. Brown,
(Seal) *Acting Secretary of Agriculture.*

13 EXHIBIT "B."

O-41, as amended Issued June 21, 1940

UNITED STATES DEPARTMENT OF AGRICULTURE

DIVISION OF MARKETING AND MARKETING AGREEMENTS

T. 7, Ch. IX, Code of Fed. Regs.

Marketing Orders—Part 941

ORDER, AS AMENDED, REGULATING THE HANDLING OF MILK IN THE CHICAGO, ILLINOIS, MARKETING AREA[1]

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[1] Section 941.0 to and including Section 941.12 issued under the authority contained in 48 Stat. 31 (1933), 7 U. S. C. 601 et seq. (1934); 49 Stat. 750 (1935); 50 Stat. 246 (1937), 7 U. S. C. 601 et seq. (Supp. IV, 1938).

Whereas, pursuant to the powers conferred upon the Secretary by Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), the Secretary of Agriculture of the United States tentatively approved, on August 18, 1939, a marketing agreement and issued, effective September 1, 1939, an order, both of which regulate the handling of milk in the Chicago, Illinois, marketing area; and

Whereas, the Secretary, having reason to believe that amendments to said tentatively approved marketing agreement and to said order would tend to effectuate the declared policy of said act, gave, on the 14th day of March 1940, notice of a public hearing which was held at Chicago, Illinois, on March 20, 21, 22, and 23, 1940, at which times and place all interested parties were afforded an opportunity to be heard on certain proposed amended provisions of the tentatively approved marketing agreement and of the order; and

Whereas, after such hearing, handlers of more than fifty percent of the volume of milk covered by this order, as amended, which is marketed within the Chicago, Illinois, marketing area, refused or failed to sign a tentatively approved marketing agreement, as amended, relating to the handling of milk in such marketing area; and

Whereas, the requirements of section 8c (9) of said act have been complied with; and

Whereas, the Secretary finds, upon the evidence introduced at the above-mentioned public hearing, said findings being in addition to findings made upon the evidence introduced at the original hearing on said order and being in addition to the other findings and determinations made prior to or at the time of the original issuance of said order (which findings are hereby ratified and affirmed, save only as such findings are in conflict with the findings hereinafter set forth):

Section 941.0 *Findings.* 1. That the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to sections 2 and 8e of said act, are not reasonable in view of the price of feeds, the available supplies of feed, and other economic conditions which affect market supply of and demand for such milk, and that the minimum prices set forth in this order, as amended, are such prices as will reflect the afore-

said factors, insure a sufficient quantity of pure of wholesome milk, and be in the public interest;

2. That the provisions of the order, as amended, requiring handlers to pay producers, through the producer-settlement fund, the difference between the value of milk or cream, purchased or received from sources other than producers or other handlers, at the Class IV price and the value according to its actual utilization by the handler, are incidental to and not inconsistent with the other provisions of the order, as amended, and are necessary to effectuate such other provisions;

3. That the order, as amended, regulates the handling of milk in the same manner as and is applicable only to handlers defined in a marketing agreement, as amended, upon which a hearing has been held; and

4. That the issuance of this order, as amended, and all of its terms and conditions, will tend to effectuate the declared policy of the act:

Now, Therefore, H. A. Wallace, Secretary of Agriculture, pursuant to the powers conferred upon him by said act, hereby orders that such handling of milk in the Chicago, Illinois, marketing area, as is in the current of interstate commerce, or as directly burdens, obstructs, or affects interstate commerce, shall, from the effective date hereof, be in compliance with the following terms and conditions:

Sec. 941.1 *Definitions.* (a) TERMS. The following terms as used herein shall have the following meanings:

(1) The term "Chicago, Illinois, marketing area," hereinafter called the "marketing area," means the territory lying within the corporate limits of the cities of Chicago and Evanston, and the territory lying within the corporate limits of the villages of Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park, all in the State of Illinois.

(2) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(3) The term "approved plant" means any plant which is approved by any health authority for the receiving of milk which may be disposed of as Class I milk, as defined in Sec. 941.4, in the marketing area.

(4) The term "producer" means any person who produces milk which is received by a handler at an approved plant, or who produces milk which, upon proof furnished

satisfactory to the market administrator, is qualified to be received at such approved plant.

(5) The term "handler" means any person who, on his own behalf or on behalf of others, purchases or receives milk from producers, associations of producers, other handlers, persons producing milk not qualified to be received at an approved plant, or persons operating an unapproved plant, all, or a portion, of which milk is disposed of as Class I milk or Class II milk in the marketing area; and who, on his own behalf or on behalf of others, engages in such handling of milk, or cream therefrom, as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products. This definition shall be deemed to include any person who receives milk from producers at an approved plant from which no milk or cream is disposed of in the marketing area, and any cooperative association or handler with respect to the milk of any producer which it causes to be delivered to a plant from which no milk or cream is disposed of in the marketing area, for the account of such cooperative association or handler.

(6) The term "market administrator" means the agency which is described in Sec. 941.2 for the administration hereof.

(7) The term "delivery period" means the current marketing period from the first to the last day of each month, both inclusive.

(8) The term "cooperative association" means any cooperative association of producers which the Secretary determines (a) to have its entire activities under the control of its members, and (b) to have and to be exercising full authority in the sale of milk of its members.

(9) The term "frozen cream" means milk the butterfat from which is held in an approved cold storage warehouse at an average temperature below zero degrees Fahrenheit for 7 consecutive days, as shown by charts of a recording thermometer.

(10) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

(11) The term "Secretary" means the Secretary of Agriculture of the United States.

Sec. 941.2 *Market administrator.* (a) SELECTION, REMOVAL, AND BOND. The agency for the administration here-

of shall be a market administrator who shall be a person selected and subject to removal by the Secretary. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

(b) COMPENSATION. The market administrator shall be entitled to such reasonable compensation as shall be determined by the Secretary.

(c) POWERS. The market administrator shall have the power: (1) to administer the terms and provisions hereof, and (2) report to the Secretary complaints of violations of this order.

(d) DUTIES. The market administrator, in addition to the duties hereinafter described, shall:

(1) Keep such books and records as will clearly reflect the transactions provided for herein;

(2) Submit his books and records to examination by the Secretary at any and all times;

(3) Furnish such information and such verified reports as the Secretary may request;

(4) Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

(5) Publicly disclose, after reasonable notice, the name of any person who has not made reports pursuant to Sec. 941.3, or made payments required by Sec. 941.8;

(6) Prepare and disseminate, for the benefit of producers, consumers, and handlers, such statistics and information concerning the operation hereof as do not reveal confidential information;

(7) Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof; and

(8) Pay, out of the funds received pursuant to Sec. 941.9, the cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator, his own compensation, and all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties.

(e) ANNOUNCEMENT OF PRICES. The market administrator shall compute and publicly announce prices as follows:

(1) Not later than the 5th day after the end of each delivery period, the prices for all classes of milk pursuant to Sec. 941.5 (a), the differentials pursuant to Sec. 941.5 (b), and the Class I prices applicable pursuant to Sec. 941.5 (d).

(2) Not later than the 14th day after the end of each delivery period, the uniform price computed pursuant to Sec. 941.7 (b).

Sec. 941.3 *Reports of handlers.* (a) SUBMISSION OF REPORTS. Each handler shall report to the market administrator, in the detail and on forms prescribed by the market administrator, as follows:

(1) On or before the 7th day after the end of each delivery period, each handler who purchases or receives milk from associations of producers and other handlers, with respect to all milk purchased or received from such sources, shall submit to the market administrator and to the association of producers or handlers from whom the milk was purchased, a record of the utilization of such milk, classified pursuant to Sec. 941.4.

(2) On or before the 10th day after the end of each delivery period, the quantity and the butterfat test of (a) the receipts of milk at each plant from producers, (b the receipts of milk at each plant from other handlers, (c) the receipts of milk or cream from sources other than producers and handlers, if any, (d) the receipts at each plant of the milk produced by him, if any, and (e) the utilization of all receipts of milk for the delivery period.

(3) On or before the 10th day after the end of each delivery period, the information required with respect to producer additions, producer withdrawals, and changes in names of farm operators.

(4) On or before the 10th day after the end of each delivery period, the sale or disposition of milk outside the marketing area, pursuant to Sec. 941.5 (d) as follows: (a) the amount and the utilization of such milk, (b) the butterfat test thereof, (c) the point of use, (d) the plant from which such milk is shipped, and (e) such other information with respect thereto as the market administrator may require.

(5) On or before the 25th day after the end of each delivery period, his producer pay roll, which shall show for each producer (a) the total delivery of milk with the average butterfat test thereof, (b) the net amount of payment to such producer made pursuant to Sec. 941.8, (c) any deductions and charges made by the handler, and (d) such other information with respect thereto as the market administrator may require.

(b) VERIFICATION OF REPORTS AND PAYMENTS. The market administrator shall verify all reports and payments of each handler by audit of such handler's records, and of the records of any other handler or person upon whose disposition of milk such handler claims classification. Each handler shall keep adequate records of receipts and utilization of milk and, shall, during the usual hours of business, make available to the market administrator or his representative such records and facilities as will enable the market administrator to:

(1) Verify the receipts and disposition of all milk required to be reported pursuant to this section, and, in case of errors or omissions, ascertain the correct figures;

(2) Weigh, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends; and

(3) Verify the payments to producers prescribed in Sec. 941.8.

Sec. 941.4 *Classification of milk.* (a) BASIS OF CLASSIFICATION. All milk purchased or received by a handler from producers, associations of producers, and other handlers, including milk produced by him, if any, and including milk or cream purchased or received from sources other than from producers and handlers, if any, shall be reported by the handler in the classes set forth in paragraph (b) of this section: Provided, That if milk is moved from the plant where first received from producers to the plant of a second handler who has facilities for manufacturing milk products, such milk shall be classified as Class I milk, if moved from the second handler's plant in the form of milk to the plant of another handler, or nonhandler, who distributes fluid milk, and such milk shall be classified as Class II milk if moved from the second handler's plant in the form of cream to the plant of another handler, or nonhandler, who distributes fluid milk. If such milk is moved from the second handler's

plant in the form of milk or cream to the plant of another handler, or nonhandler, who does not distribute fluid milk, such milk or cream shall be reported by such second handler, according to its utilization by the receiving handler or nonhandler, subject to verification by the market administrator: Provided further, That if milk is moved from the plant where first received from producers to the plant of a second handler who does not have facilities for manufacturing milk products, and if such milk is moved from the second handler's plant in the form of milk or cream to the plant of a nonhandler, such milk or cream shall be reported by the second handler according to its utilization by the nonhandler, subject to verification by the market administrator. If such milk is moved to a third handler's plant, such milk shall be classified as Class I milk if moved from the third handler's plant in the form of milk to the plant of another handler, or nonhandler, who distributes fluid milk; and such milk shall be classified as Class II milk if moved from the third handler's plant in the form of cream to the plant of another handler, or nonhandler, who distributes fluid milk. If such milk is moved from the third handler's plant, in the form of milk or cream to the plant of another handler, or nonhandler, who does not distribute fluid milk, such milk or cream shall be reported by such third handler according to its utilization by the receiving handler or nonhandler, subject to verification by the market administrator.

(b) CLASSES OF UTILIZATION. Subject to the conditions set forth in paragraph (a) of this section, the classes of utilization of milk shall be as follows:

(1) Class I milk shall be all milk disposed of in the form of fluid milk, except such milk as is used for purposes for which no approval by health authorities in the marketing area is necessary, and all milk not accounted for as Class II milk, Class III milk, or Class IV milk.

(2) Class II milk shall be all milk, except skim milk, disposed of in the form of flavored milk and flavored milk drinks, and all milk, the butterfat from which is disposed of in the form of cream, sweet or sour, cottage cheese, buttermilk, frozen cream, ice cream, and ice cream mix.

(3) Class III milk shall be all milk the butterfat from which is used to produce a milk product other than one of those specified in Class II and Class IV, and all milk disposed of for those purposes for which no approval by health authorities in the marketing area is necessary.

(4) Class IV milk shall be all milk the butterfat from which is used to produce butter and cheese, except cottage cheese, and all milk accounted for as actual plant shrinkage: Provided, That such plant shrinkage shall not exceed 2 percent of the total receipts of milk from producers. Any handler whose report claimed the original classification of milk in this class shall be liable under the provisions of Sec. 941.8 (g) for the difference between the Class IV and Class II prices for the delivery period in which the Class IV classification was claimed on any such milk, if the butterfat used in the production of butter is subsequently used in the production of ice cream or ice cream mix.

(c) RESPONSIBILITY OF HANDLERS IN ESTABLISHING THE CLASSIFICATION OF MILK. In establishing the classification of milk, as required in paragraph (b) of this section, the responsibilities of handlers in establishing the classification of milk received by them shall be as follows:

(1) In establishing the classification of any milk received by a handler from producers, the burden rests upon the handler who receives the milk from producers to account for the milk and to prove to the market administrator that such milk should not be classified as Class I milk.

(2) With respect to milk, or skimmed milk, disposed of to another handler, the burden rests upon the handler who purchased the milk from producers to account for the milk, or skimmed milk, and to prove to the market administrator that such milk, or skimmed milk, should not be classified as Class I milk: Provided, That if verification by the market administrator discloses a higher utilization than that reported pursuant to Sec. 941.3 (a) (1) for milk purchased by a handler from a cooperative association, the market administrator shall notify the purchasing handler and such handler shall pay to such cooperative association, within 5 days after notification by the market administrator, the difference in value of such milk as verified by the market administrator and as reported by such handler pursuant to Sec. 941.3 (a) (1).

(d) COMPUTATION OF MILK IN EACH CLASS. For each delivery period, each handler shall compute, in the manner and on forms prescribed by the market administrator, the amount of milk in each class, as defined in paragraph (b) of this section, as follows:

(1) Determine the total pounds of milk (a) received from producers, (b) produced by him, if any, (c) received from other handlers, if any, (d) received from other sources, if any, and (e) add together the resulting amounts.

(2) Determine the total pounds of butterfat received as follows: (a) multiply the weight of the milk received from producers by its average butterfat test, (b) multiply the weight of the milk produced by him, if any, by its average butterfat test, (c) multiply the weight of the milk received from other handlers, if any, by its average butterfat test, (d) multiply the weight of the milk received from other sources, if any, by its average butterfat test, and (e) add together the resulting amounts.

(3) Determine the total pounds of milk in Class I as follows: (a) convert to quarts the quantity of milk disposed of in the form of milk, except such milk as is used for purposes for which no approval by health authorities in the marketing area is necessary, and multiply by 2.15, (b) multiply the result by the average butterfat test of such milk, and (c) if the quantity of butterfat so computed when added to the pounds of butterfat in Class II milk, Class III milk, and Class IV milk, computed pursuant to subparagraphs (4) (b), (5) (b), and (6) (c) of this paragraph, is less than the total pounds of butterfat received, computed in accordance with subparagraph (2) of this paragraph, an amount equal to the difference shall be divided by 3.5 percent and added to the quantity of milk determined pursuant to (a) of this subparagraph.

(4) Determine the total pounds of milk in Class II as follows: (a) multiply the actual weight of each of the several products of Class II milk by its average butterfat test, (b) add together the resulting amounts, and (c) divide the result obtained in (b) of this subparagraph by 3.5 percent.

(5) Determine the total pounds of milk in Class III as follows: (a) multiply the actual weight of each of the several products of Class III milk, including all milk disposed of for those purposes for which no approval by health authorities in the marketing area is necessary, by its average butterfat test, (b) add together the resulting amounts, and (c) divide the result obtained in (b) of this subparagraph by 3.5 percent.

(6) Determine the total pounds of milk in Class IV as follows: (a) multiply the actual weight of each of the several products of Class IV milk by its average butter-

fat test, (b) add together the resulting amounts, (c) subtract the total pounds of butterfat in Class I milk, Class II milk, and Class III milk, computed pursuant to subparagraphs (3) (b), (4) (b), and (5) (b) of this paragraph, and the total pounds of butterfat computed pursuant to (b) of this subparagraph, from the total pounds of butterfat computed pursuant to subparagraph (2) of this paragraph, which resulting quantity shall be allowed as plant shrinkage for the purposes of this paragraph (but in no event shall such plant shrinkage allowance exceed 2 percent of the total receipts of butterfat from producers by the handler) and shall be added to the result obtained in (b) of this subparagraph, and (d) divide the result obtained in (c) of this subparagraph by 3.5 percent.

(7) Determine the classification of milk received from producers as follows:

(i) Subtract pro rata out of each class the quantity of milk received from the handler's own farm.

(ii) Subtract from the total pounds of milk in each class the total pounds of milk which were received from other handlers and used in such class.

(iii) Subtract from the total pounds of milk in each class the total pounds of milk which were received from sources other than producers and handlers and used in such class.

(iv) Except as set forth in paragraph (e) of this section, the result shall be known as the "net pooled milk" in each class.

(e) RECONCILIATION OF UTILIZATION OF MILK BY CLASSES WITH RECEIPTS OF MILK FROM PRODUCERS. (1) If the total utilization of milk in the various classes for any handler, as computed pursuant to paragraph (d) of this section, is less than the receipts of milk from producers, the market administrator shall increase the total pounds of milk in Class IV for such handler by an amount equal to the difference between the receipts of milk from producers and the total utilization of milk by classes for such handler, which result shall be known as the "net pooled milk" in each class.

(2) If the total utilization of milk in the various classes for any handler, as computed pursuant to paragraph (d) of this section, is greater than the receipts of milk from producers, the market administrator shall decrease the total pounds of milk in Class IV for such handler by an

amount equal to the difference between the receipts of milk from producers and the total utilization of milk by classes for such handler, which result shall be known as the "net pooled milk" in each class.

Sec. 941.5 *Minimum prices.* (a) CLASS PRICES. (1) Except as set forth in paragraph (d) of this section and subject to the differentials set forth in paragraphs (b) and (c) of this section, each handler shall pay, at the time and in the manner set forth in Section 941.8, for milk purchased or received by such handler at any plant located not more than 70 miles by rail or highway, whichever is the shortest, from the City Hall in Chicago, not less than the prices set forth in this paragraph. Any handler who purchases or receives, during any delivery period, milk from a cooperative association which is also a handler shall on or before the 15th day after the end of the delivery period pay such cooperative association in full for such milk at not less than the minimum class prices, with appropriate differentials, applicable pursuant to this section.

(2) Class I milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content computed pursuant to the formula set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any, 70 cents per hundredweight for the months of July, August, September, October, and November; 55 cents per hundredweight for the months of December, January, February, March, and April; and 45 cents per hundredweight for the months of May and June: Provided, That with respect to Class I milk disposed of under a program approved by the Secretary for the sale or disposition of milk to low-income consumers, including persons on relief, the price shall be $1.395 per hundredweight during delivery periods prior to July 1, 1940, and thereafter $1.63 per hundredweight.

(3) Class II milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content computed pursuant to the formula set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any, 32 cents per hundredweight for the months of July, August, September, October, and November; 25 cents per hundredweight for the months of December,

January, February, March, and April; and 20 cents per hundredweight for the months of May and June.

(4) Class III milk—The price per hundredweight for milk containing 3.5 percent butterfat during each delivery period shall be the average, computed by the market administrator, of prices, as reported to the United States Department of Agriculture, paid during such delivery period to farmers at each of the evaporated milk plants where milk is purchased for evaporating purposes at places listed in this subparagraph and for which prices are reported, but in no event shall such price be less than the price computed pursuant to the formula set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendement thereto.

Location of evaporated milk plants

Mt. Pleasant, Mich.	Berlin, Wis.
Sparta, Mich.	Richland Center, Wis.
Hudson, Mich.	Oconomowoc, Wis.
Wayland, Mich.	Jefferson, Wis.
Coopersville, Mich.	New Glarus, Wis.
Greenville, Wis.	Belleville, Wis.
Black Creek, Wis.	New London, Wis.
Orfordville, Wis.	Manitowoc, Wis.
Chilton, Wis.	West Bend, Wis.

(5) Class IV milk—Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture, for the delivery period during which such milk was received, and add 20 per cent.

(6) In the event the marketing agreement for evaporated milk, issued by the Secretary on May 31, 1935, is suspended or terminated, the formula price to be used in determining the price for Class I milk, Class II milk and Class III milk, in lieu of the formula set forth in section 1 of article VI of the said marketing agreement, shall be calculated by the market administrator as follows: Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market as reported by the United States Department of Agriculture for the delivery period during which such milk was received, and add 30 percent.

(b) *Butterfat differential to handlers.* If any handler has purchased or received milk from producers containing

more or less than 3.5 percent butterfat, such handler shall add or deduct, per hundredweight of milk, for each one-tenth of 1 percent butterfat above or below 3.5 percent, an amount equal to the Class IV price computed pursuant to paragraph (a) of this section, divided by 35.

(c) LOCATION ADJUSTMENTS TO HANDLERS. (1) With respect to milk purchased or received from producers at a plant located more than 70 miles by rail or highway, whichever is the shorter, from the City Hall in Chicago, which is classified as Class I milk or Class II milk, there shall be deducted 2 cents per hundredweight and ¼ cent per hundredweight, respectively, for each additional 15 miles or part thereof that such plant is located in excess of 70 miles from the City Hall in Chicago: Provided, That if any handler can prove to the market administrator that the l. c. l. freight rate, approved by the Interstate Commerce Commission, or the State authorities having the power to fix intrastate rail rates, for the movement of cream in 40-quart cans from the shipping point for the plant where such milk is received from producers to the marketing area, is greater than ¼ cent per hundredweight of milk, such actual freight rate shall be allowed such handler on Class II milk, but in no case shall such rate exceed ½ cent per hundredweight of milk. There shall be no location adjustment to handlers with respect to Class III milk or Class IV milk.

(2) For purposes of this paragraph, Class I milk shall be considered to be that milk purchased or received from producers at plants located nearest to the marketing area from which whole milk is shipped to the marketing area: Provided, That when actual shipments of milk to the marketing area by any handler are shown to be in excess of such handler's Class I milk, the location adjustments on Class I milk as provided in this section shall be applied to such milk, up to and including 105 percent of such handler's Class I milk. Class II milk shall be considered to be that milk purchased or received from producers at plants located nearest to the marketing area, after accounting for Class I milk, from which whole milk or cream is shipped to the marketing area.

(d) SALES OUTSIDE THE MARKETING AREA. The price to be paid by a handler for Class I milk disposed of outside the marketing area, in lieu of the price otherwise applicable pursuant to this section, shall be the price, as ascertained

by the market administrator which is being paid in the market where such milk is disposed of, for milk of equivalent use: Provided, That in the event such Class I milk is disposed of outside the 70-mile zone, such price as ascertained by the market administrator shall be adjusted by an amount equal to the carload freight rate approved by the Interstate Commerce Commission for the movement of milk in 40-quart cans from the shipping point for the plant where such milk is received from producers to the railroad delivery point serving the market where such milk is utilized as Class I milk.

Sec. 941.6 *Application of provisions.* (a) HANDLERS WHO ARE ALSO PRODUCERS. (1) No provision hereof shall apply to a handler who is also a producer and who purchases or receives no milk from producers or an association of producers, except that such handler shall make reports to the market administrator at such time and in such manner as the market administrator may request.

(2) The market administrator, in computing the value of milk for any handler pursuant to Sec. 941.7, shall consider as Class IV milk any milk or cream received in bulk by such handler from a handler who distributes a part of his own production. If the receiving handler disposes of such milk or cream for other than Class IV purposes, such handler shall pay to producers, through the producer-settlement fund, the difference between (a) the value of such milk or cream at the Class IV price and (b) the value according to its actual utilization by the handler.

(b) PAYMENT FOR MILK RECEIVED FROM SOURCES OTHER THAN FROM PRODUCERS OR OTHER HANDLERS. If any handler has purchasesd or received milk or cream from sources other than producers or other handlers, the market administrator, in computing the value of milk for such handler pursuant to Sec. 941.7, shall consider such milk or cream as Class IV milk. If the receiving handler uses such milk or cream for other than Class IV purposes, such handler shall pay to producers, through the producer-settlement fund, the difference between (a) the value of such milk or cream at the Class IV price and (b) the value according to its actual utilization by the handler. This provision shall not apply to a handler who purchases or receives milk or cream from sources other than producers or handlers, if such handler can prove to the market administrator that such milk or cream was used for purposes

which did not violate any regulations issued by the various health authorities in the marketing area.

(c) PAYMENT FOR MILK SHOWN AS INVENTORIES OF FROZEN CREAM HELD ON EFFECTIVE DATE OF THIS AMENDED ORDER. If any handler has purchased or received milk from producers, or associations of producers, prior to the effective date of this amended order, the butterfat from which is on hand, on the effective date of this amended order, at a plant in the form of frozen cream, or cream which is subsequently so handled as to be classified as frozen cream, and such butterfat is finally disposed of in the manufacture of a product classified as Class II milk, such handler shall pay to producers, through the producer-settlement fund, the difference between the Class III price in effect for the delivery period during which the milk was received from producers and the price computed as follows: Add 20 cents to the price computed pursuant to the formula set forth in section 1 of article VI of the marketing agreement for evaporated milk, issued by the Secretary on May 31, 1935, for the delivery period during which the milk was received from producers. The market administrator or his representative shall at all times have access to the necessary records to determine the physical presence of the cream and the temperature of the room where stored.

Sec. 941.7 *Determination of uniform price.* (a) NET POOL OBLIGATION OF HANDLERS. Subject to the provisions of Sec. 941.6, the net pool obligation of each handler for milk received from producers during each delivery period shall be a sum of money computed for such delivery period as follows:

(1) Multiply the "net pooled milk" in each class, computed pursuant to Sec. 941.4, by the class price, with appropriate differentials applicable pursuant to Sec. 941.5 (b), (c), and (d), and add together the resulting values;

(2) Deduct, if the average butterfat content of all milk received from producers is in excess of 3.5 percent, and add, if the average butterfat content of all milk received from producers is less than 3.5 percent, the total value of the butterfat differential applicable pursuant to Sec. 941.8(c).

(b) COMPUTATION OF THE UNIFORM PRICE. The market administrator shall compute the uniform price per hundredweight of milk for each delivery period in the following manner:

(1) Combine into one total the net pool obligations of all handlers, computed pursuant to paragraph (a) of this section, who made the reports pursuant to Sec. 941.3(a) (2) for such delivery period;

(2) Add the amount of the location differentials applicable pursuant to Sec. 941.8(b);

(3) Add the amount of cash balance in the producer-settlement fund;

(4) Divide the result by the total quantity of net pooled milk of all handlers whose reports are included in this computation; and

(5) Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. The result shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants located within the 70-mile zone.

Sec. 941.8 *Payment for milk.* (a) TIME AND METHOD OF PAYMENT. On or before the 18th day after the end of each delivery period each handler shall pay each producer, for milk purchased or received during the delivery period, an amount of money representing not less than the total value of such milk, at the uniform price per hundredweight, computed pursuant to Sec. 941.7 (b) and subject to the location adjustments and butterfat differential set forth in this section.

(b) LOCATION ADJUSTMENTS TO PRODUCERS. In Making payments to produeers pursuant to paragraph (a) of this section, handlers shall deduct with respect to all milk purchased or received from producers at a plant located more than 70 miles by rail or highway, whichever is the shortest, from the City Hall in Chicago, the amount specified as follows:

	Cents per cwt.
Within 71 to 85 miles	2
Within 86 to 100 miles	4
Within 101 to 115 miles	6
Within 116 to 130 miles	8
Within 131 to 145 miles	10
Within 146 to 160 miles	12
Within 161 to 175 miles	14

For each 15 miles or part thereof beyond 175 miles from the City Hall in Chicago, an additional ½ cent per cwt.

(c) BUTTERFAT DIFFERENTIAL TO PRODUCERS. The uniform price paid to producers shall be plus or minus, as the case may be, 4 cents per hundredweight for each one-tenth of 1 percent above or below 3.5 percent average butterfat content of milk delivered by any producer during any delivery perior.

(d) PRODUCER SETTLEMENT FUND. The market administrator shall establish and maintain a separate fund known as "the producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to paragraphs (e) and (g) and out of which he shall make all payments to handlers pursuant to paragraphs (f) and (g) of this section: Provided, That the market administrator shall offset any such payment due to any handler against payments due from such handler. Immediately after computing the uniform price for each delivery period, the market administrator shall compute the amount by which each handler's net pool obligation, including the payments to producers which are required to be made pursuant to Sec. 941.6, is greater or less than the sum obtained by multiplying such handler's net pooled milk by the uniform price and shall enter such amount on each handler's account as such handler's pool debit or pool credit, as the case may be, and render such handler a transcript of his account.

(e) PAYMENTS TO THE PRODUCER-SETTLEMENT FUND. On or before the 16th day after the end of each delivery period each handler shall make full payment to the market administrator of any pool debit balance shown on the account rendered, pursuant to paragraph (d) of this section, for the preceding delivery period.

(f) PAYMENTS OUT OF THE PRODUCER-SETTLEMENT FUND. On or before the 17th day after the end of each delivery period, the market administrator shall pay to each handler the pool credit balance shown on the account rendered, pursuant to paragraph (d) of this section, if any, for the preceding delivery period, less any unpaid obligations of the handler. If at such time the balance in the producer-settlement fund is insufficient to make all payments pursuant to this paragraph, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available. No handler who, on the 18th day after the end of each delivery period, has not received the balance

of the payment due him from the market administrator shall be deemed to be in violation of paragraph (a) of this section if he reduces his total payments uniformly to all producers by not more than the amount of the reduction in payment from the producer-settlement fund.

(g) ADJUSTMENTS OF ERRORS IN PAYMENTS. Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund pursuant to paragraph (d) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer, for milk purchased or received by such handler, discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

Sec. 941.9 *Expense of administration.* (a) PAYMENTS BY HANDLERS. As his pro-rata share of the expense of the administration hereof each handler, except those handlers exempt from the provisions hereof as set forth in Sec. 941.6 (a), shall pay to the market administrator, on or before the 18th day after the end of each delivery period, a sum not exceeding 2 cents per hundredweight with respect to all milk purchased or received by him during such delivery period from producers, from sources other than producers, or from other handlers, or produced by him, the exact sum to be determined by the market administrator, subject to review by the Secretary: Provided, That each handler which is a cooperative association shall pay such pro-rata share of expense of administration only on that milk of producers actually received at a plant of such cooperative association, or caused to be delivered by such cooperative association to a plant from which no milk or cream is disposed of in the marketing area.

(b) SUITS BY MARKET ADMINISTRATOR. The market administrator may maintain a suit in his own name against

any handler for the collection of such handler's pro-rata share of expense set forth in this section.

Sec. 941.10 *Marketing services.* (a) MARKETING SERVICE DEDUCTION. In making payments to producers pursuant to Sec. 941.8, each handler, with respect to all milk received from each producer during each delivery period, at a plant not operated by a cooperative association of which such producer is a member, shall, except as set forth in paragraph (b) of this section, deduct 3 cents per hundredweight, or such lesser amount as the market administrator shall determine to be sufficient, such determination to be subject to review by the Secretary, and shall, on or before the 18th day after the end of such delivery period, pay such deductions to the market administrator. Such moneys shall be expended by the market administrator for verification of weights, samples, and tests of milk received from such producers and in providing for market information to such producers. The market administrator may contract with an association or associations of producers for the furnishing of the whole or any part of such services to, or with respect to the milk received from such producers.

(b) MARKETING SERVICE DEDUCTIONS WITH RESPECT TO MEMBERS OF A PRODUCERS' COOPERATIVE ASSOCIATION. In the case of producers whose milk is received at a plant not operated by a cooperative association of which such producers are members and for whom a cooperative association is actually performing the services set forth in paragraph (a) of this section, each handler shall, in lieu of the deductions specified in paragraph (a) of this section, make such deductions from payments made pursuant to Sec. 941.8 as may be authorized by such producers, and pay over on or before the 18th day after the end of each delivery period such deductions to the associations rendering such service of which such producers are members.

Sec. 941.11 *Market advisory committee.* (a) Subsequent to the effective date hereof, the market administrator may select a representative committee of the industry for purposes (1) of recommendation of amendments to this order, and (2) for conference, counsel, and advice.

Sec. 941.12 *Effective time, suspension, or termination of order.* (a) EFFECTIVE TIME. The provisions hereof, or any amendment hereto, shall become effective at such

time as the Secretary may declare and shall continue in force until suspended, or terminated, pursuant to paragraph (b) of this section.

(b) SUSPENSION OR TERMINATION OF ORDER. The Secretary may suspend or terminate this order or any provision hereof whenever he finds that this order or any provision hereof obstructs or does not tend to effectuate the declared policy of the act. This order shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

(c) CONTINUING POWER AND DUTY OF THE MARKET ADMINISTRATOR. If upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination: Provided, That any such acts required to be performed by the market administrator shall, if the Secretary so directs, be performed by such other person, persons, or agency as the Secretary may designate.

(1) The market administrator, or such other person as the Secretary may designate, shall (a) continue in such capacity until removed by the Secretary, (b) from time to time account for all receipts and disbursements, and when so directed by the Secretary deliver all funds on hand, together with the books and records of the market administrator or such person, to such person as the Secretary shall direct, and (c) if so directed by the Secretary execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator or such person pursuant thereto.

(d) LIQUIDATION AFTER SUSPENSION OR TERMINATION. Upon the suspension or termination of any or all provisions hereof the market administrator, or such person as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid or owing at the time of such suspension or termination. Any funds collected pursuant to the provisions hereof, over and above the amounts

necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator or such person in liquidating and distributing such funds, shall be distributed to the contributing handlers and producers in an equitable manner.

Now, Therefore, H. A. Wallace, Secretary of Agriculture, acting under the provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, for the purposes and within the limitations therein contained and not otherwise, hereby executes and issues in duplicate this order, as amended, under his hand and the official seal of the Department of Agriculture, in the city of Washington, District of Columbia, on this 21st day of June 1940, and declares this order, as amended, to be effective on and after the 1st day of July 1940.

H. A. Wallace

(Seal) *Secretary of Agriculture.*

14 EXHIBIT "C."

Order No. 41, as Amended Issued June 27, 1941

UNITED STATES DEPARTMENT OF AGRICULTURE

SURPLUS MARKETING ADMINISTRATION

T. 7, Ch. IX, Code of Fed. Regs.

Marketing Orders—Part 941

ORDER, AS AMENDED, REGULATING THE HANDLING OF MILK IN THE CHICAGO, ILLINOIS, MARKETING AREA[1]

CONTENTS

Sec. 941.0 Findings.
941.1 Definitions.
941.2 Market administrator.
941.3 Reports of handlers.
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[1] Section 941.0 to and including Section 941.12 issued under the authority contained in 48 Stat. 31 (1933), 7 U. S. C. 601 et seq. (1934); 49 Stat. 750 (1935); 50 Stat. 246 (1937), 7 U. S. C. 601 et seq. (Supp. IV, 1938).

941.5 Minimum prices.
941.6 Application of provisions.
941.7 Determination of uniform price to producers.
941.8 Payments for milk.
941.9 Expense of administration.
941.10 Marketing services.
941.11 Market advisory committee.
941.12 Effective time, suspension, or termination of order.

Pursuant to the powers conferred upon the Secretary by Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), the Secretary of Agriculture of the United States tentatively approved, on May 22, 1940, a marketing agreement and issued, effective July 1, 1940, an order, as amended, both of which regulate the handling of milk in the Chicago, Illinois, marketing area.

The Secretary, having reason to believe that amendments to said tentatively approved marketing agreement and to said order, as amended, would tend to effectuate the declared policy of said act, gave, on the 31st day of May 1941, notice of a public hearing which was held at Chicago, Illinois, beginning on April 9, 1941, at which time and place all interested parties were afforded an opportunity to be heard on certain proposed amended provisions of the tentatively approved marketing agreement and of the order, as amended.

After such hearing, handlers of more than fifty percent of the volume of milk covered by this order, as amended, which is marketed within the Chicago, Illinois, marketing area, refused or failed to sign a tentatively approved marketing agreement, as amended, relating to the handling of milk in such marketing area.

The requirements of section 8c(9) of said act have been complied with.

The Secretary finds, upon the evidence introduced at the above-mentioned public hearing, said findings being in addition to findings made upon the evidence introduced at the original hearing on said order and on said order, as amended, and being in addition to the other findings and determinations made prior to or at the time of the original

issuance of said order (which findings are hereby ratified and affirmed, save only as such findings are in conflict with the findings hereinafter set forth):

Section 941.0 *Findings.* 1. That the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to sections 2 and 8e of said act, are not reasonable in view of the price of feeds, the available supplies of feed, and other economic conditions which affect market supply of and demand for such milk, and that the minimum prices set forth in this order, as amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

2. That the order, as amended, regulates the handling of milk in the same manner as and is applicable only to handlers defined in a marketing agreement, as amended, upon which a hearing has been held; and

3. That the issuance of this order, as amended, and all of its terms and conditions, will tend to effectuate the declared policy of the act:

Now, Therefore, Paul H. Appleby, Acting Secretary of Agriculture, pursuant to the powers conferred upon him by said act, hereby orders that such handling of milk in the Chicago, Illinois, marketing area, as is in the current of interstate commerce, or as directly burdens, obstructs, or affects interstate commerce, shall, from the effective date hereof, be in compliance with the following terms and conditions:

Sec. 941.1 *Definitions.* (a) TERMS. The following terms as used herein shall have the following meanings:

(1) The term "Chicago, Illinois, marketing area," hereinafter called the "marketing area," means the territory lying within the corporate limits of the cities of Chicago and Evanston, and the territory lying within the corporate limits of the villages of Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park, all in the State of Illinois.

(2) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(3) The term "approved plant" means any plant which is approved by any health authority for the receiving of milk which may be disposed of as Class I milk, as defined in Sec. 941.4, in the marketing area.

(4) The term "producer" means any person who produces milk which is received by a handler at an approved plant, or who produces milk which, upon proof furnished satisfactory to the market administrator, is qualified to be received at such approved plant.

(5) The term "handler" means any person, who, on his own behalf or on behalf of others, purchases or receives milk from producers, associations of producers, other handlers, persons producing milk not qualified to be received at an approved plant, or persons operating an unapproved plant, all, or a portion, of which milk is disposed of as Class I milk or Class II milk in the marketing area; and who, on his own behalf or on behalf of others engages in such handling of milk, or cream therefrom, as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products. This definition shall be deemed to include any person who receives milk from producers at an approved plant from which no milk or cream is disposed of in the marketing area, and any cooperative association or handler with respect to the milk of any producer which it causes to be delivered to a plant from which no milk or cream is disposed of in the marketing area, for the account of such cooperative association or handler.

(6) The term "market administrator" means the agency which is described in Sec. 941.2 for the administration hereof.

(7) The term "delivery period" means the current marketing period from the first to the last day of each month, both inclusive.

(8) The term "cooperative association" means any cooperative association of producers which the Secretary determines (a) to have its entire activities under the control of its members, and (b) to have and to be exercising full authority in the sale of milk of its members.

(9) The term "frozen cream" means milk the butterfat from which is held in an approved cold storage warehouse at an average temperature below zero degrees Fahrenheit for seven (7) consecutive days, as shown by charts of a recording thermometer.

(10) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

(11) The term "Secretary" means the Secretary of Agriculture of the United States.

Sec. 941.2 *Market administrator.* (a) SELECTION, REMOVAL, AND BOND. The agency for the administration hereof shall be a market administrator who shall be a person selected and subject to removal by the Secretary. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

(b) COMPENSATION. The market administrator shall be entitled to such reasonable compensation as shall be determined by the Secretary.

(c) POWERS. The market administrator shall have the power: (1) to administer the terms and provisions hereof, and (2) report to the Secretary complaints of violations of this order.

(d) DUTIES. The market administrator, in addition to the duties hereinafter described shall:

(1) Keep such books and records as will clearly reflect the transactions provided for herein;

(2) Submit his books and records to examination by the Secretary at any and all times;

(3) Furnish such information and such verified reports as the Secretary may request;

(4) Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

(5) Publicly disclose, after reasonable notice, the name of any person who has not made reports pursuant to Sec. 941.3, or made payments required by Sec. 941.8;

(6) Prepare and disseminate, for the benefit of producers, consumers, and handlers, such statistics and information concerning the operation hereof as do not reveal confidential information;

(7) Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof; and

(8) Pay, out of the funds received pursuant to Sec. 941.9, the cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator, his own compensation, and all other ex-

penses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties.

(e) ANNOUNCEMENT OF PRICES. The market administrator shall compute and publicly announce prices as follows:

(1) Not later than the 5th day after the end of each delivery period, the prices for all classes of milk pursuant to Sec. 941.5 (a), the differentials pursuant to Sec. 941.5 (c), and the Class I prices applicable pursuant to Sec. 941.5 (e).

(2) Not later than the 14th day after the end of each delivery period, the uniform price computed pursuant to Sec. 941.7 (b).

Sec. 941.3 *Reports of handlers.* (a) SUBMISSION OF REPORTS. Each handler shall report to the market administrator, in the detail and on forms prescribed by the market administrator, as follows:

(1) On or before the 7th day after the end of each delivery period, each handler who purchases or receives milk from associations of producers and other handlers, with respect to all milk purchased or received from such sources, shall submit to the market administrator and to the association of producers or handlers from whom the milk was purchased, a record of the utilization of such milk, classified pursuant to Sec. 941.4.

(2) On or before the 10th day after the end of each delivery period, the quantity, butterfat test, and butterfat pounds of (a) the receipts of milk at each plant from producers, (b) the receipts of milk at each plant from other handlers, (c) the receipts of milk or cream from sources other than producers and handlers, if any, (d) the receipts at each plant of the milk produced by him, if any, and (e) the utilization of all receipts of milk for the delivery period.

(3) On or before the 10th day after the end of each delivery period the information required with respect to producer additions and producer withdrawals, and changes in the names of farm operators.

(4) On or before the 10th day after the end of each delivery period, the sale or disposition of milk outside the marketing area, pursuant to Sec. 941.5 (e) as follows: (a) the amount and the utilization of such milk, (b) the

butterfat test thereof, (c) the point of use, (d) the plant from which such milk is shipped, and (e) such other information with respect thereto as the market administrator may require.

(5) On or before the 25th day after the end of each delivery period his producer payroll, which shall show for each producer (a) the total delivery of milk with the average butterfat test thereof, (b) the net amount of payment to such producer made pursuant to Sec. 941.8, (c) any deductions and charges made by the handler, and (d) such other information with respect thereto as the market administrator may require.

(b) VERIFICATION OF REPORTS AND PAYMENTS. The market administrator shall verify all reports and payments of each handler by audit of such handler's records, and of the records of any other handler of person upon whose disposition of milk such handler claims classification. Each handler shall keep adequate records of receipts and utilization of milk and shall, during the usual hours of business, make available to the market administrator or his representative such records and facilities as will enable the market administrator to:

(1) Verify the receipts and disposition of all milk required to be reported pursuant to this section, and, in case of errors or omissions, ascertain the correct figures;

(2) Weigh, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends; and

(3) Verify the payments to producers prescribed in Sec. 941.8.

Sec. 941.4. *Classification of milk.* (a) BASIS OF CLASSIFICATION. All milk purchased or received by a handler from producers, associations of producers, and other handlers, including milk produced by him, if any, and including milk or cream purchased or received from sources other than producers or handlers, shall be reported by the handler in the classes set forth in paragraph (b) of this section: Provided, That (1) any milk moving as fluid milk from any handler's plant to a plant of a nonhandler who distributes fluid milk shall be classified as Class I milk and any cream moved in the form of cream to such nonhandler shall be classified as Class II milk, except for milk or cream in excess of the amount of Class I or Class II milk distributed by the nonhandler; (2)

any milk or cream moving from a handler's plant to a plant of a nonhandler, who does not distribute fluid milk shall be classified according to its use by such nonhandler subject to verification by the market administrator; (3) any milk moving from the handler's plant where the milk was first received from producers to the plant of a second handler, which has manufacturing facilities, shall be Class I milk if moved from the second handler's plant as fluid milk, and Class II if moved as cream; and (4) any milk moving from the handler's plant where the milk was first received from producers to a second handler's plant which has no manufacturing facilities may be classified according to its utilization by a third handler: And provided further, That in the case of the sale of milk or cream by a handler to a person who is a handler under another Federal milk agreement or order, such milk may be classified on a prorata basis.

(b) CLASSES OF UTILIZATON. Subject to the conditions set forth in paragraph (a) of this section, the classes of utilization of milk shall be as follows:

(1) Class I milk shall be all milk disposed of in the form of fluid milk, excluding bulk milk disposed of to bakeries, soup companies, and candy manufacturing establishments, but including bulk milk disposed of to hotels, restaurants, and other retail food establishments, and all milk not accounted for as Class II milk, Class III milk, or Class IV milk.

(2) Class II milk shall be all milk, except skim milk, disposed of in the form of flavored milk and flavored milk drinks, and all milk, the butterfat from which is disposed of in the form of sweet or sour cream, cottage cheese, buttermilk, frozen cream, ice cream, and ice cream mix.

(3) Class III milk shall be all milk the butterfat from which is used to produce a milk product other than one of those specified in Class II and Class IV, and all bulk milk disposed of to bakeries, soup companies, and candy manufacturing establishments.

(4) Class IV milk shall be all milk the butterfat from which is used to produce butter and cheese, except cottage cheese, and all milk accounted for as actual plant shrinkage: Provided, That such plant shrinkage shall not exceed 2 percent of the total receipts of milk from producers and from the handlers' own production. Any

handler whose report claimed the original classification of milk in this class shall be liable under the provisions of Sec. 941.8 (g) for the difference between the Class IV and Class II prices for the delivery period in which the Class IV classification was claimed on any such milk, if the butterfat used in the production of butter is subsequently used in the production of ice cream or ice cream mix.

(c) RESPONSIBILITY OF HANDLERS IN ESTABLISHING THE CLASSIFICATION OF MILK. In establishing the classification of milk as required in paragraph (b) of this section, the responsibilities of handlers in establishing the classification of milk received by them shall be as follows:

(1) In establishing the classification of any milk received by a handler from producers, the burden rests upon the handler who receives the milk from producers to account for the milk and to prove to the market administrator that such milk should not be classified as Class I milk.

(2) With respect to milk, or skimmed milk, disposed of to another handler, the burden rests upon the handler who purchased the milk from producers to account for the milk, or skimmed milk, and to prove to the market administrator that such milk, or skimmed milk, should not be classified as Class I milk: Provided, That if verification by the market administrator discloses a higher utilization than that reported pursuant to Sec. 941.3 (a) (1) for milk purchased by a handler from a cooperative association, the market administrator shall notify the purchasing handler and such handler shall within 5 days after notification by the market administrator make adjustment to such cooperative association on the basis of such higher utilization as verified by the market administrator.

(d) COMPUTATION OF MILK IN EACH CLASS. For each delivery period, each handler shall compute, in the manner and on forms prescribed by the market administrator, the amount of milk in each class, as defined in paragraph (b) of this section, as follows:

(1) Determine the total pounds of milk (a) received from producers, (b) produced by him, if any, (c) received from other handlers, if any, (d) received from other sources, if any, and (e) add together the resulting amounts.

(2) Determine the total pounds of butterfat received as follows: (a) multiply the weight of the milk received

from producers by its average butterfat test, (b) multiply the weight of the milk produced by him, if any, by its average butterfat test, (c) multiply the weight of the milk received from other handlers, if any, by its average butterfat test, (d) multiply the weight of the milk received from other sources, if any, by its average butterfat test, and (e) add together the resulting amounts.

(3) Determine the total pounds of milk in Class I as follows: (a) convert to quarts the quantity of milk disposed of in the form of milk, excluding bulk milk disposed of to bakeries, soup companies, and candy manufacturing establishments, and multiply by 2.15, (b) multiply the result by the average butterfat test of such milk, and (c) if the quantity of butterfat so computed when added to the pounds of butterfat in Class II milk, Class III milk, and Class IV milk, computed pursuant to subparagraphs (4)(b), (5)(b), and (6)(c) of this paragraph, is less than the total pounds of butterfat received, computed in accordance with subparagraph (2) of this paragraph, an amount equal to the difference shall be divided by 3.5 percent and added to the quantity of milk determined pursuant to (a) of this subparagraph.

(4) Determine the total pounds of milk in Class II as follows: (a) multiply the actual weight of each of the several products of Class II milk by its average butterfat test, (b) add together the resulting amounts, and (c) divide the result obtained in (b) of this subparagraph by 3.5 percent.

(5) Determine the total pounds of milk in Class III as follows: (a) multiply the actual weight of each of the several products of Class III milk, including all bulk milk disposed of to bakeries, soup companies, and candy manufacturing establishments by its average butterfat test, (b) add together the resulting amounts, and (c) divide the result obtained in (b) of this subparagraph by 3.5 percent.

(6) Determine the total pounds of milk in Class IV as follows: (a) multiply the actual weight of each of the several products of Class IV milk by its average butterfat test, (b) add together the resulting amounts, (c) subtract the total pounds of butterfat in Class I milk, Class II milk, and Class III milk, computed pursuant to subparagraphs (3)(b), (4)(b), and (5)(b) of this paragraph, and the total pounds of butterfat computed pursuant to (b) of this subparagraph, from the total pounds of butterfat com-

puted pursuant to subparagraph (2) of this paragraph, which resulting quantity shall be allowed as plant shrinkage for the purposes of this paragraph (but in no event shall such plant shrinkage allowance exceed 2 percent of the total receipts of butterfat from producers by the handler) and shall be added to the result obtained in (b) of this subparagraph, and (d) divide the result obtained in (c) of this subparagraph by 3.5 percent.

(7) Determine the classification of milk received from producers as follows:

(i) Subtract from the total pounds of milk in each class the total pounds of milk which were received from other handlers and used in such class.

(ii) Subtract from the total pounds of milk in each class the total pounds of milk which were received from sources other than producers and handlers and used in such class.

(iii) Subtract pro rata out of the remaining milk in each class the quantity of milk received from the handler's own farm.

(iv) Except as set forth in paragraph (e) of this section, the result shall be known as the "net pooled milk" in each class.

(e) In the event of a difference between the total quantity of milk utilized in several classes as computed pursuant to paragraph (d) of this section and the quantity of milk received from producers, except for excess milk or milk equivalent of butterfat pursuant to Sec. 941.6 (c), such difference shall be reconciled as follows:

(1) If the total utilization of milk in the various classes for any handler, as computed pursuant to paragraph (d) of this section, is less than the receipts of milk from producers, the market administrator shall increase the total pounds of milk in Class IV for such handler by an amount equal to the difference between the receipts of milk from producers and the total utilization of milk by classes for such handler, which result shall be known as the "net pooled milk" in each class.

(2) If the total utilization of milk in the various classes for any handler, as computed pursuant to paragraph (d) of this section, is greater than the receipts of milk from producers, the market administrator shall decrease the total pounds of milk in Class IV for such handler by an amount equal to the difference between the receipts of

milk from producers and the total utilization of milk by classes for such handler, which result shall be known as the "net pooled milk" in each class.

Sec. 941.5 *Minimum prices.* (a) CLASS PRICES. (1) Except as set forth in paragraph (e) of this section and subject to the differentials set forth in paragraphs (c) and (d) of this section, each handler shall pay, at the time and in the manner set forth in Sec. 941.8, for milk purchased or received by such handler at any plant located not more than 70 miles by rail or highway, whichever is the shorter, from the City Hall of Chicago, not less than the prices set forth in this paragraph. Any handler who purchases or receives, during any delivery period, milk from a cooperative association which is also a handler shall, on or before the 15th day after the end of the delivery period, pay such cooperative association in full for such milk at not less than the minimum class prices, with appropriate differentials, applicable pursuant to this section.

(2) Class I milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content, computed pursuant to the formula set forth in paragraph (b) of this section, 70 cents per hundredweight for the months of July, August, September, October, and November; 55 cents per hundredweight for the months of December, January, February, March, and April; and 45 cents per hundredweight for the months of May and June: Provided, That with respect to Class I milk disposed of under a program approved by the Secretary for the sale or disposition of milk to low-income consumers, including persons on relief, the price shall be $1.75 per hundredweight.

(3) Class II milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content, computed pursuant to the formula set forth in paragraph (b) of this section, 32 cents per hundredweight for the months of July, August, September, October, and November; 25 cents per hundredweight for the months of December, January February, March, and April; and 20 cents per hundredweight for the months of May and June.

(4) Class III milk—The price per hundredweight for milk containing 3.5 percent butterfat during each delivery period shall be the average, computed by the market administrator, of prices, as reported to the United States Department of Agriculture, paid during such delivery period to farmers at each of the places or evaporated milk

plants where milk is purchased or received for evaporating purposes at places listed in this subparagraph and for which prices are reported, but in no event shall such price be less than the price computed pursuant to the formula set forth in paragraph (b) of this section.

Location of evaporated milk plants and places

Mt. Pleasant, Mich.	Berlin, Wis.
Sparta, Mich.	Richland Center, Wis.
Hudson, Mich.	Oconomowoc, Wis.
Wayland, Mich.	Jefferson, Wis.
Coopersville, Mich.	New Glarus, Wis.
Greenville, Wis.	Belleville, Wis.
Black Creek, Wis.	New London, Wis.
Orfordville, Wis.	Manitowoc, Wis.
Chilton, Wis.	West Bend, Wis.

(5) Class IV milk—Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which such milk was received, and add 20 percent: Provided, That such price shall be subject to the following adjustment: (1) Add 3½ cents per hundredweight for each full one-half cent that the price of dry skim milk for human consumption is above 6½ cents per pound, (2) subtract 3½ cents per hundredweight for each full one-half cent that the price of such dry skim milk is below 5 cents per pound. For purposes of this paragraph, the price per pound of such dry skim milk to be used in determining such adjustment in the Class IV price shall be the average of the carlot prices for dry skim milk for human consumption as published by the United States Department of Agriculture for Chicago or for a Chicago area during the delivery period, including in such average the quotations published for any ffactional part of the previous delivery period which were not published and available for the price determination of such dry skim milk for the previous delivery period; and in the absence of such published quotations for Chicago or a Chicago area, the average of the carlot price quotations for such dry skim milk by the United States Department of Agriculture for New York shall be used.

(b) BASIC FORMULA TO BE USED IN DETERMINING CLASS I AND CLASS II PRICES. The basic formula to be used in de-

termining the Class I and Class II prices, set forth in this section, per hundredweight of milk shall be determined for each delivery period as follows:

(1) Multiply the average wholesale price per pound of 92-score butter at Chicago for said delivery period as reported by the United States Department of Agriculture by six (6).

(2) Add 2.4 times the average weekly prevailing price per pound of "Twins" during said delivery period on the Wisconsin Cheese Exchange at Plymouth, Wisconsin: Provided, That if the price of "Twins" is not quoted on the Wisconsin Cheese Exchange the weekly prevailing price of "Cheddars" shall be deemed to be the prevailing price for "Twins" and shall be used in determining the price pursuant to this paragraph.

(3) Divide by seven (7), the sum so determined hereafter referred to in this paragraph as the "combined butter and cheese value."

(4) To the combined butter and cheese value add 30 percent thereof.

(5) Multiply the sum computed in subparagraph (4) above by 3.5, the result of which shall be the basic formula price per hundredweight of milk in determining Class I and Class II prices.

(c) BUTTERFAT DIFFERENTIAL TO HANDLERS. If any handler has purchased or received milk from producers containing more or less than 3.5 percent butterfat, such handler shall add or deduct, per hundredweight of milk, for each one-tenth of 1 percent butterfat above or below 3.5 percent, an amount equal to the Class IV price computed pursuant to paragraph (a) of this section, divided by 35.

(d) LOCATION ADJUSTMENTS TO HANDLERS. (1) With respect to milk purchased or received from producers at a plant located more than 70 miles by rail or highway, whichever is the shorter, from the City Hall in Chicago, which is classified as Class I milk or Class II milk, there shall be deducted 2 cents per hundredweight and ¼ cent per hundredweight, respectively, for each additional 15 miles or part thereof that such plant is located in excess of 70 miles from the City Hall in Chicago: Provided, that no such deduction shall apply to unaccounted for milk classified as Class I milk pursuant to paragraph (c) of Sec. 941.4 (d)(3), and such unaccounted for milk shall be considered to have been received at the most distant plant

at which the handler receives milk from producers: Provided further, That if any handler can prove to the market administrator that the l. c. l. freight rate, approved by the Interstate Commerce Commission, or the State authorities having the power to fix intrastate rail rates, for the movement of cream in 40-quart cans from the shipping point for the plant where such milk is received from producers to the marketing area, is greater than ¼ cent per hundredweight of milk, such actual freight rate shall be allowed such handler on Class II milk, but in no case shall such rate exceed ½ cent per hundredweight of milk. There shall be no location adjustment to handlers with respect to Class III milk or Class IV milk.

(2) For purposes of this paragraph, Class I milk shall be considered to be that milk purchased or received from producers at plants located nearest to the marketing area from which whole milk is shipped to the marketing area: Provided, That when actual shipments of milk to the marketing area by any handler from two or more plants located in different zones are shown to be in excess of such handler's Class I milk, the location adjustment on Class I milk as provided in this section shall be applied to such milk up to and including 110 percent of such handler's Class I milk. Class II milk shall be considered to be that milk purchased or received from producers at plants located nearest to the marketing area, after accounting for Class I milk, from which whole milk or cream is shipped to the marketing area: Provided, That upon proof satisfactory to the market administrator that Class II milk was received from producers at a more distant plant location, adjustment shall be allowed from the plant at which such Class II milk was received from producers.

(e) SALES OUTSIDE THE MARKETING AREA. (1) The price to be paid by a handler for Class I milk disposed of outside the marketing area, in lieu of the price otherwise applicable pursuant to this section and except as provided in subparagraph (2) of this paragraph, shall be the price, as ascertained by the market administrator, which is being paid for milk of equivalent use in the market where such milk is disposed of: Provided, That in the event such Class I milk is disposed of outside the 70-mile zone, such Class I price, as ascertained by the market administrator, shall be subject to a transportation adjustment of 2 cents per hundredweight of such milk for every 15 miles or fraction

thereof up to and including 105 miles and thereafter 1 cent for every 10 miles or fraction thereof from the shipping point for the plant where such milk is received from producers to the market where such milk is utilized as Class I milk: Provided further, That such Class I price, as ascertained by the market administrator, less the adjustment for transportation, shall not be lower than the Class I price, f. o. b. 70-mile zone, as set forth in Sec. 941.5 (a)(2) minus 20 cents.

(2) The price to be paid by a handler for Class I milk disposed of outside the marketing area for which no price can be ascertained on the basis provided for in subparagraph (1) of this paragraph, including Class I milk disposed of to Government institutions and establishments on a basis of bids, shall be the price for Class I milk set forth in Sec. 941.5 (a)(2) applicable for the plant at which such milk is received from producers, which price shall not be subject to adjustment for transportation as provided in subparagraph (1) of this paragraph.

Sec. 941.6 *Application of provisions.* (a) HANDLERS WHO ARE ALSO PRODUCERS. No provision hereof shall apply to a handler whose sole sources of supply are receipts from his own production and from other handlers, except that such handlers shall make reports to the market administrator at such time and in such manner as the market administrator may request.

(b) PAYMENT FOR MILK RECEIVED FROM SOURCES DETERMINED AS OTHER THAN FROM PRODUCERS OR OTHER HANDLERS. If any handler has purchased or received milk or butterfat from sources determined as other than producers or other handlers, the market administrator, in computing the value of milk for such handler pursuant to Sec. 941.7, shall consider such milk or the milk equivalent of such butterfat as Class IV milk. If the receiving handler uses such milk or butterfat for other than Class IV purposes, such handler shall pay to producers, through the producer-settlement fund, the difference between (a) the value of such milk or butterfat at the Class IV price and (b) the value according to its actual utilization by the handler. This provision shall not apply to milk or butterfat from sources determined as other than producers or handlers, if such handler can prove to the market administrator that such milk or butterfat was used for purposes which

did not violate any regulations issued by the various health authorities in the marketing area.

(c) PAYMENT FOR EXCESS MILK OR BUTTERFAT. In the event that a handler, after subtracting receipts from his own production, receipts from other handlers, and receipts from sources determined as other than producers or other handlers, has disposed of milk and/or butterfat in excess of the milk and/or butterfat which, on the basis of his reports, has been credited to his producers as having been delivered by them, such handler shall pay to producers, through the producer-settlement fund, the value of such milk and/or the milk equivalent of such butterfat in accordance with its utilization.

Sec. 941.7 *Determination of uniform price.* (a) NET POOL OBLIGATION OF HANDLERS. Subject to the provisions of Sec. 941.6, the net pool obligation of each handler for milk received from producers during each delivery period shall be a sum of money computed for such delivery period as follows:

(1) Multiply the "net pooled milk" in each class, computed pursuant to Sec. 941.4, by the class price, with appropriate differentials applicable pursuant to Sec. 941.5 (c), (d), and (e), and add together the resulting values.

(2) Deduct, if the average butterfat content of all milk received from producers is in excess of 3.5 percent, and add, if the average butterfat content of all milk received from producers is less than 3.5 percent, the total value of the butterfat differential applicable pursuant to Sec. 941.8 (c).

(b) COMPUTATION OF THE UNIFORM PRICE. The market administrator shall compute the uniform price per hundredweight of milk for each delivery period in the following manner:

(1) Combine into one total the net pool obligations of all handlers, computed pursuant to paragraph (a) of this section, who made the reports pursuant to Sec. 941.3 (a) (2) for such delivery period;

(2) Add the amount of the location differentials applicable pursuant to Sec. 941.8 (b);

(3) Add the amount of cash balance in the producer-settlement fund;

(4) Divide the result by the total quantity of net pooled milk of all handlers whose reports are included in this computation; and

(5) Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. The result shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants located within the 70-mile zone.

Sec. 941.8 *Payment for milk.* (a) TIME AND METHOD OF PAYMENT. On or before the 18th day after the end of each delivery period each handler shall pay each producer, for milk purchased or received during the delivery period, an amount of money representing not less than the total value of such milk, at the uniform price per hundredweight, computed pursuant to Sec. 941.7 (b) and subject to the location adjustments and butterfat differential set forth in this section.

(b) LOCATION ADJUSTMENTS TO PRODUCERS. In making payments to producers pursuant to paragraph (a) of this section, handlers shall deduct with respect to all milk purchased or received from producers, at a plant located more than 70 miles by rail or highway, whichever is the shorter, from the City Hall in Chicago, the amount specified as follows:

	Cents per cwt.
Within 70.1 to 85 miles	2
Within 85.1 to 100 miles	4
Within 100.1 to 115 miles	6
Within 115.1 to 130 miles	8
Within 130.1 to 145 miles	10
Within 145.1 to 160 miles	12
Within 160.1 to 175 miles	14

For each 15 miles or part thereof beyond 175 miles from the City Hall in Chicago, an additional ½ cent per hundredweight.

(3) BUTTERFAT DIFFERENTIAL TO PRODUCERS. The uniform price paid to producers shall be plus or minus, as the case may be, 4 cents per hundredweight for each one-tenth of 1 percent above or below 3.5 percent average butterfat content of milk delivered by any producer during any delivery period.

(d) PRODUCER-SETTLEMENT FUND. The market administrator shall establish and maintain a separate fund known

as the "producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to paragraphs (e) and (g) and out of which he shall make all payments to handlers pursuant to paragraphs (f) and (g) of this section: Provided, That the market administrator shall offset any such payment due to any handler against payments due from such handler. Immediately after computing the uniform price for each delivery period, the market administrator shall compute the amount by which each handler's net pool obligation, including the payments to producers which are required to be made pursuant to Sec. 941.6, is greater or less than the sum obtained by multiplying such handler's net pooled milk by the uniform price and shall enter such amount on each handler's account as such handler's pool debit or pool credit, as the case may be, and render such handler a transcript of his account.

(e) PAYMENTS TO THE PRODUCER-SETTLEMENT FUND. On or before the 16th day after the end of each delivery period each handler shall make full payment to the market administrator of any pool debit balance shown on the account rendered, pursuant to paragraph (d) of this section, for the preceding delivery period.

(f) PAYMENTS OUT OF THE PRODUCER-SETTLEMENT FUND. On or before the 17th day after the end of each delivery period, the market administrator shall pay to each handler the pool credit balance shown on the account rendered, pursuant to paragraph (d) of this section, if any, for the preceding delivery period, less any unpaid obligations of the handler. If at such time the balance in the producer-settlement fund is insufficient to make all payments pursuant to this paragraph, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available. No handler, who, on the 18th day after the end of each delivery period, has not received the balance of the payment due him from the market administrator shall be deemed to be in violation of paragraph (a) of this section if he reduces his total payments uniformly to all producers by not more than the amount of the reduction in payment from the producer-settlement fund.

(g) ADJUSTMENTS OF ERRORS IN PAYMENTS. Whenever verification by the market administrator of reports or payments of any handler discloses errors made in pay-

ments to the producer-settlement fund pursuant to paragraph (d) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer, for milk purchased or received by such handler, discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

Sec. 941.9 *Expense of administration.* (a) PAYMENTS BY HANDLERS. As his prorata share of the expense of the administration hereof each handler, except those handlers exempt from the provisions hereof as set forth in Sec. 941.6 (a), shall pay to the market administrator, on or before the 18th day after the end of each delivery period, a sum not exceeding 2 cents per hundredweight with respect to all milk purchased or received by him during such delivery period from producers, from sources other than producers or other handlers, or produced by him, the exact sum to be determined by the market administrator, subject to review by the Secretary: Provided, That each handler, which is a cooperative association shall pay such prorata share of expense of administration only on that milk of producers actually received at a plant of such cooperative association, or caused to be delivered by such cooperative association to a plant from which no milk or cream is disposed of in the market area.

(b) SUITS BY MARKET ADMINISTRATOR. The market administrator may maintain a suit in his own name against any handler for the collection of such handler's prorata share of expense set forth in this section.

Sec. 941.10 *Marketing services.* (a) MARKETING SERVICE DEDUCTION. In making payments to producers pursuant to Sec. 941.8, each handler, with respect to all milk received from each producer during each delivery period, at a plant not operated by a cooperative association of

which such producer is a member, shall, except as set forth in paragraph (b) of this section, deduct 3 cents per hundredweight or such lesser amount as the market administrator shall determine to be sufficient, such determination to be subject to review by the Secretary, and shall, on or before the 18th day after the end of such delivery period, pay such deductions to the market administrator. Such moneys shall be expended by the market administrator for verification of weights, samples, and tests of milk received from such producers and in providing for market information to such producers. The market administrator may contract with an association or associations of producers for the furnishing of the whole or any part of such services to, or with respect to, the milk received from such producers.

(b) MARKETING SERVICE DEDUCTIONS WITH RESPECT TO MEMBERS OF A PRODUCERS' COOPERATIVE ASSOCIATION. In the case of producers whose milk is received at a plant not operated by a cooperative association of which such producers are members and for whom a cooperative association is actually performing the services set forth in paragraph (a) of this section, each handler shall, in lieu of the deductions specified in paragraph (a) of this section, make such deductions from payments made pursuant to Sec. 941.8 as may be authorized by such producers, and pay over on or before the 18th day after the end of each delivery period such deductions to the associations rendering such service of which such producers are members.

Sec. 941.11 *Market advisory committee.* (a) Subsequent to the effective date hereof, the market administrator may select a representative committee of the industry for purposes (1) of recommendation of amendments to this order, and (2) for conference, counsel, and advice.

Sec. 941.12. *Effective time, suspension, or termination of order.* (a) EFFECTIVE TIME. The provisions hereof, or any amendment hereto, shall become effective at such time as the Secretary may declare and shall continue in force until suspended, or terminated, pursuant to paragraph (b) of this section.

(b) SUSPENSION OR TERMINATION OF ORDER. The Secretary may suspend or terminate this order or any provision hereof whenever he finds that this order or any provision hereof obstructs or does not tend to effectuate the declared

policy of the act. This order shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

(c) CONTINUING POWER AND DUTY OF THE MARKET ADMINISTRATOR. If upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination: Provided, That any such acts required to be performed by the market administrator shall, if the Secretary so directs, be performed by such other person, persons, or agency as the Secretary may designate.

(1) The market administrator, or such other person as the Secretary may designate, shall (a) continue in such capacity until removed by the Secretary, (b) from time to time account for all receipts and disbursements, and when so directed by the Secretary deliver all funds on hand, together with the books and records of the market administrator or such person, to such person as the Secretary shall direct, and (c) if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator or such person pursuant thereto.

(d) LIQUIDATION AFTER SUSPENSION OR TERMINATION. Upon the suspension or termination of any or all provisions hereof the market administrator, or such person as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid or owing at the time of such suspension or termination. Any funds collected pursuant to the provisions hereof, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator or such person in liquidating and distributing such funds, shall be distributed to the contributing handlers and producers in an equitable manner.

Now, Therefore, Paul H. Appleby, Acting Secretary of Agriculture, acting under the provisions of Public Act

No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, for the purposes and within the limitations therein contained and not otherwise, hereby executes and issues in duplicate this order, as amended, under his hand and the official seal of the Department of Agriculture, in the city of Washington, District of Columbia, on this 27th day of June 1941, and declares this order, as amended, to be effective on and after the 1st day of July 1941.

Paul H. Appleby,
(Seal) *Acting Secretary of Agriculture.*

15 EXHIBIT "D."

O-41-1 Issued August 29, 1941

T. 7,[1]

UNITED STATES DEPARTMENT OF AGRICULTURE

SURPLUS MARKETING ADMINISTRATION

Ch. IX[1] Marketing Orders—Part 941[1]

AMENDMENT NO. 1 TO THE ORDER, AS AMENDED, REGULATING THE HANDLING OF MILK IN THE CHICAGO, ILLINOIS, MARKETING AREA[2]

CONTENTS

Sec. 941.0 Findings
941.5 Minimum prices

H. A. Wallace, Secretary of Agriculture of the United States of America, pursuant to the powers conferred upon the Secretary by Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), issued, effective July 1, 1940, Order No. 41, as amended, regulating the handling of milk in the Chicago, Illinois,

[1] Code of Federal Regulations.

[2] Section 941.0 and Section 941.5 issued under the authority contained in 48 Stat. 31 (1933), 7 U. S. 601 et seq. (1934); 49 Stat. 750 (1935); 50 Stat. 246 (1937), 7 U. S. C. 601 et seq. (Supp. IV, 1938).

marketing area, which order, as amended, was further amended, effective July 1, 1941.

Paul H. Appleby, Acting Secretary of Agriculture, tentatively approved, on June 19, 1941, a marketing agreement, as amended, regulating the handling of milk in the Chicago, Illinois, marketing area.

There being reason to believe that amendments to said tentatively approved marketing agreement, as amended, and to said order, as amended, would tend to effectuate the declared policy of said act, notice was given, on the 30th day of July 1941, of a public hearing which was held at Chicago, Illinois, beginning on August 4, 1941, at which time and place all interested parties were afforded an opportunity to be heard on a proposal to amend the tentatively approved marketing agreement, as amended, and the order, as amended.

After such hearing, handlers of more than fifty percent of the volume of milk covered by said order, as amended, which is marketed within the Chicago, Illinois, marketing area, refused or failed to sign a tentatively approved marketing agreement, as amended, regulating the handling of milk in such marketing area, in the same manner as said order, as amended, by this amendment.

The requirements of section 8c (9) of said act have been complied with.

It is hereby found, upon the evidence introduced at the above-mentioned public hearing, said findings being in addition to the findings made upon the evidence introduced at the original hearing on said order and on said order, as amended, and being in addition to the other findings and determinations made prior to or at the time of the original issuance of said order (which findings are hereby ratified and affirmed, save only as such findings are in conflict with the findings hereinafter set forth):

Sec. 941.0 *Findings.*—1. That the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to sections 2 and 8e of said act, are not reasonable in view of the prices of feeds, the available supplies of feed, and other economic conditions which affect the market supply of and demand for such milk, and that the minimum prices set forth in this amendment to said order, as amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

2. That the order, as amended, and as hereby amended, regulates the handling of milk in the same manner as and is applicable only to handlers defined in a marketing agreement, as amended, upon which a hearing has been held; and

3. That the issuance of this amendment to the order, as amended, and all of its terms and conditions, as so amended, will tend to effectuate the declared policy of the act:

Pursuant to the powers conferred upon the Secretary by said act, it is hereby ordered that Order No. 41, as amended, regulating the handling of milk in the Chicago, Illinois, marketing area be and it is hereby amended as follows:

1. Delete Sec. 941.5 (a) (2) and substitute therefor the following:

(2) *Class I milk.*—The price per hundredweight for Class I milk during each delivery period, except the delivery periods of May and June, shall be the price determined pursuant to paragraph (b) of this section, plus 70 cents; and during the delivery periods of May and June the price per hundredweight for Class I milk shall be the price determined pursuant to paragraph (b), plus 50 cents: *Provided,* That with respect to Class I milk disposed of under a program approved by the Secretary for the sale or disposition of milk to low-income consumers, including persons on relief, the price shall be $2.20 per hundredweight.

2. Delete Sec. 941.5 (a) (3) and substitute therefor the following:

(3) *Class II milk.*—The price per hundredweight for Class II milk during each delivery period, except the delivery periods of May and June, shall be the price determined pursuant to paragraph (b) of this section, plus 32 cents; and during the delivery periods of May and June the price per hundredweight for Class II milk shall be the price determined pursuant to paragraph (b) of this section, plus 20 cents.

3. Delete Sec. 941.5 (a) (5) and substitute therefor the following:

(5) *Class IV milk.*—Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which such milk was received, and add 20 per cent: *Provided,* That such price shall be subject to the following adjustments:

(1) add 3½ cents per hundredweight for each full one-half cent that the price of dry skim milk for human consumption is above 5½ cents per pound, or (2) subtract 3½ cents per hundredweight for each full one-half cent that the price of such dry skim milk is below 5½ cents per pound. For purposes of determining this adjustment the price per pound of dry skim milk to be used shall be the average of the carlot prices for dry skim milk for human consumption, f. o. b. manufacturing plant, as published by the United States Department of Agriculture for a Chicago area during the delivery period, including in such average the quotations published for any fractional part of the previous delivery period which were not published and available for the price determination of such dry skim milk for the previous delivery period. In the event the United States Department of Agriculture does not publish carlot prices for dry skim milk for human consumption, f. o. b. manufacturing plant, the average of the carlot prices for dry skim milk for human consumption, delivered at Chicago, shall be used. In the latter event the Class IV price shall be subject to the following adjustments: (1) add 3½ cents per hundredweight for each full one-half cent that the price of dry skim milk for human consumption, delivered at Chicago, is above 7½ cents per pound, or (2) subtract 3½ cents per hundredweight for each full one-half cent that such price of dry skim milk is below 7½ cents per pound.

4. Delete Sec. 941.5 (b) and substitute therefor the following:

(b) *Basic formula price to be used in determining Class I and Class II prices.*—The basic formula price to be used in determining the Class I and Class II prices, set forth in this section, per hundredweight of milk shall be the price for Class III milk, determined pursuant to subparagraph (4) of paragraph (a) of this section, or that derived from the following formula, whichever is higher:

(1) Multiply the average wholesale price per pound of 92-score butter at Chicago for said delivery period as reported by the United States Department of Agriculture by six (6).

(2) Add 2.4 times the average weekly prevailing price per pound of "Twins" during said delivery period on the Wisconsin Cheese Exchange at Plymouth, Wisconsin: *Provided,* That if the price of "Twins" is not quoted on

the Wisconsin Cheese Exchange the weekly prevailing price of "Cheddars" shall be deemed to be the prevailing price for "Twins" and shall be used in determining the price pursuant to this paragraph.

(3) Divide by seven (7), the sum so determined being hereafter referred to in this paragraph as the "combined butter and cheese value."

(4) To the combined butter and cheese value add 30 percent thereof.

(5) Multiply the sum computed in subparagraph (4) above by 3.5.

5. Delete Sec. 941.5 (c) and substitute therefor the following:

(c) *Butterfat differential to handlers.*—If any handler has purchased or received milk from producers containing more or less than 3.5 percent butterfat, such handler shall add or deduct, per hundredweight of milk, for each one-tenth of 1 percent butterfat above or below 3.5 percent, an amount computed as follows: to the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which the milk was received, add 20 percent and divide the result obtained by 10.

Now, Therefore, the undersigned, pursuant to the powers conferred upon the Secretary by Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, for the purposes and within the limitations therein contained and not otherwise, hereby executes and issues this amendment to the order, as amended, regulating the handling of milk in the Chicago, Illinois, marketing area, under his hand and the official seal of the Department of Agriculture, in the city of Washington, District of Columbia, on this 29th day of August, and declares this order, as amended, to be effective on and after the 6th day of September 1941.

(S) Claude R. Wickard,
Secretary of Agriculture.

Filed Nov. 13, 1942

16 And afterwards, on to wit, the 13th day of November, 1942, came the Defts. Joseph Ruzicka and Charles Ruzicka, by their attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

17 DISTRICT COURT OF THE UNITED STATES,
for the
Northern District of Illinois,
Eastern Division.

* * (Caption—Civil Action File No. 4670) * *

ANSWER OF DEFENDANTS JOSEPH RUZICKA AND CHARLES RUZICKA TO COMPLAINT.

Now come the defendants Joseph Ruzicka and Charles Ruzicka by William Parker Ward their attorney and agent in their behalf and for their answer to the complaint herein, state as follows:

I.

The defendants admit the allegations of Paragraph I of the complaint as to the enactment of the statutes pleaded, the same being matters of public record the defendants have no knowledge of, nor means of acquiring knowledge of, the direction of the Attorney General or the direction of the Secretary of Agriculture as alleged, and therefore deny the same and demand strict proof thereof.

II.

The defendants admit the allegations of Paragraph II of the complaint except as to the habitation of their co-defendant Frank Ruzicka which they neither admit nor deny but demand strict proof thereof as they have not sufficient knowledge of, nor means of acquiring knowledge of, his habitation.

III.

The defendants have no knowledge of the purpose of this action and further state in the affirmative that they
18 have not been guilty of any violation of the provisions of said Orders and Amendments.

IV.

The defendants admit the allegations of Paragraph IV of the complaint as to the issuance of said Orders and Amendments.

V.

The defendants admit being engaged in the handling of milk and milk products in the City of Chicago, County of Cook and State of Illinois, but have no knowledge of, nor means of acquiring knowledge of, the existence of competition of their business activities with those of other handlers subject to such order, and therefore deny the allegations with inference thereto. Defendants have no information concerning the interstate aspect of the movement of the milk products handled by the Seeley Dairy or of the effect of their activities in such handling as to directly burden, obstruct or affect interstate commerce in milk and its products; hence the defendants are unable to determine their status with reference to the definition set out in the alleged Section 8c (1) of the act, and section 941.1 (a) (4) of Order No. 41; and section 941.1 (a) (5) of Order No. 41, as subsequently amended, and for want of such knowledge neither affirm or deny the allegations with reference thereto.

VI.

The defendants admit the issuance of the orders and amendments alleged in Paragraph VI of the complaint; but defendants deny the application of the provisions alleged. Defendants deny that any errors with reference to reports to, or payments of monies to the producer-settlement fund theretofore filed at the office of the market administrator of Chicago, Illinois, were disclosed or existed in their accounts, books or records; defendants deny that any amount whatsoever of monies or funds were disclosed or ascertained to be due or outstanding in favor of the producer-settlement fund at the time of the alleged billing or at any time or for any period prior or subsequent thereto. Defendants deny any violation of Order No. 41 as originally issued or subsequently amended. Defendants state that they believe, according to their best information and
19 knowledge, that any billing by the market administrator of Chicago, Illinois representing an amount of monies due in favor of the producer-settlement fund, was based on an erroneous, improper, incomplete and inaccu-

rate inspection or audit of the defendants' accounts, books and records and upon findings gathered from and based upon erroneous, improper, incomplete and inaccurate tests of the defendants' milk and milk products. Defendants further state that they believe, according to their best information and knowledge, that certain quantities of milk and milk products were not properly or correctly allocated, distributed or divided by the market administrator or his representatives into the classes of milk and milk products set forth in the orders and amendments alleged.

VII.

Defendants, further answering said complaint, state:

(A) That the orders and amendments alleged herein are invalid and void; that said orders and amendments are unreasonable, capricious, vague, uncertain, contradictory and unjust, and allege that compliance with said orders and amendments is impossible in fact and economically unsound, and thereby defeat the declared purposes of the acts, and orders and amendments alleged;

(B) That, without waiving or limiting their right to contest the validity of said orders and amendments, they have attempted in good faith to fully comply with each and every act, order and amendment, and regulation applicable to the operations of their business, and more specifically, have in good faith attempted to fully comply with the specific acts, and orders and amendments, referred to in the complaint herein;

(C) That no cause of action or claim has been alleged upon which any relief can be granted.

Wherefore The Defendants Pray:

1. That the specific and general relief sought by the plaintiff be denied.

2. That this complaint be dismissed.

3. That these defendants have judgment for their costs most wrongfully sustained.

4. That these defendants be given all such other, further, and different relief as the Court may deem just and proper.

Joseph Ruzicka and
Charles Ruzicka

By William Parker Ward,
William Parker Ward
their attorney

State of Illinois }
County of Cook } ss.

William Parker Ward being duly sworn upon oath deposes and says that he is the attorney for the defendants Joseph Ruzicka and Charles Ruzicka; that he is their duly authorized agent in this behalf; that he makes this affidavit on behalf of the defendants in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

William Parker Ward

Subscribed and sworn to before me, a notary public, in and for the State of Illinois, County of Cook, this 12th day of November, 1942.

Murray Rosenstein
(Seal) Notary Public.

21 And afterwards on, to wit, the 10th day of April, 1944, came the Plaintiff by United States attorney and filed in the Clerk's office of said Court a certain Supplemental Complaint in words and figures following, to wit: Filed April 10, 1944

22 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—Civil Action No. 4670)

SUPPLEMENTAL COMPLAINT.

Comes now the United States of America, by J. Albert Woll, United States Attorney, in and for the Northern District of Illinois, and brings this supplemental complaint, and alleges:

VII.

The defendant Frank Ruzicka having entered the Armed Forces of the United States on April 1, 1942 and this court having, in an order dated June 25, 1943, ordered the cause based upon the original complaint, withdrawn from the trial call of this court until such time as the defendant Frank Ruzicka is released from the military service of the United States, this supplemental complaint is brought for

the purpose of enforcing with respect to the defendants Joseph Ruzicka and Charles Ruzicka, and for the period from April 1, 1942 to the date of entry of judgment herein, the provisions of Order No. 41, as amended, effective July 1, 1941 and as further amended by Amendment No. 1, effective September 6, 1941, and by Amendment No. 2, effective February 1, 1943, said amendments having been issued by or on behalf of the Secretary of Agriculture of the United States (hereinafter referred to as the Secretary), as amended by an order issued by the Secretary effective
23 May 1, 1943 suspending certain provisions of Order No. 41, as amended, and by an amendment to various orders including Order No. 41, as amended, effective June 21, 1943 issued by the War Food Administrator, regulating such handling of milk in the Chicago, Illinois, marketing area, as is in the current of interstate commerce, or as directly burdens, obstructs, or affects interstate commerce in milk or its products, and to prevent and restrain the defendant from handling milk or its products in violation of said Order No. 41, as amended, effective July 1, 1941 and as further amended by Amendment No. 1, effective September 6, 1941, by Amendment No. 2, effective February 1, 1943, by said suspension order effective May 1, 1943, and by an amendment to various orders including Order No. 41, effective June 21, 1943.

VIII.

Reaffirming all of the allegations of paragraph IV of the original complaint the plaintiff further alleges that Amendment No. 2, effective February 1, 1943, to Order No. 41, as amended, effective July 1, 1941, was issued on behalf of the Secretary by the Acting Secretary of Agriculture on January 23, 1943 and was published in the Federal Register on January 29, 1943 (8 F. R. 1258). A true and complete copy of said Amendment No. 2 is attached hereto, marked exhibit "E" and made a part hereof. An order suspending certain provisions of Order No. 41, as amended, was issued April 23, 1943, published in the Federal Register on April 26, 1943 (8 F. R. 5358) and became effective May 1, 1943. A true and correct copy of the Suspension Order is attached hereto, marked exhibit "F" and made a part hereof. An amendment to various orders including Order No. 41, as amended, effective July 1, 1941, was issued effective June 21, 1943, by the War Food Administrator on June 12, 1943 and was published in the Federal Register

on June 18, 1943 (8 F. R. 8294). A true and compiete copy of said amendment is attached hereto, marked exhibit "G" and made a part hereof. All of the allegations of paragraph V of the original complaint are reaffirmed and made a part hereof.

24 IX.

Pursuant to Section 941.3(a) of the order, as amended, the defendants have filed reports, from which the Market Administrator has made computations required to be made pursuant to Section 941.4 and Section 941.5 of the order, as amended, and, pursuant to Section 941.8 of the order, as amended, has rendered the defendants monthly, a transcript of their account with the producer-settlement fund. In violation of the act and of the provisions of Section 941.8(e) of the Order, as amended, the defendants have failed and refused and still fail and refuse with respect to any delivery period, from April 1, 1942 to and including the delivery period ending February 29, 1944 to make full payment to the Market Administrator, of the amounts shown to be due from the defendants in the accounts so rendered by the Market Administrator. Payment thereof was due on or before the 16th day after the end of each delivery period. As of March 16, 1944 the defendants are indebted to the Market Administrator for the account of the producer-settlement fund, on the basis of its filed reports, in the sum of $961.27, which in violation of the Act and the provisions of the Order, as amended, the defendants have refused to pay.

X.

Section 941.8(g) of Order No. 41, as amended, provides that whenever verification by the Market Administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund, the Market Administrator shall promptly bill such handler for any unpaid amount, and such handler shall within five days, make payment to the Market Administrator of the amount so billed. Such errors in payments made by the defendants to the producer-settlement fund for the delivery periods commencing April 1, 1942 and ending August 31, 1943, have been disclosed by an audit of the defendants'
25 books and records, by the authorized representative of the Market Administrator, and the Market Administrator, on December 23, 1943, billed the defendants for

the amount necessary to adjust the defendants' account with the producer-settlement fund. The defendants, in violation of the Act and of Order No. 41, as amended, have failed and refused and still fail and refuse to make payment of the amounts so billed, and are therefore indebted to the Market Administrator for adjustment of errors disclosed in defendants' account with the producer-settlement fund, in the sum of $2,119.17 for the periods commencing April 1, 1942 and ending August 31, 1943.

XI.

Section 941.9 of Order No. 41, as amended, requires each handler to pay to the Market Administrator on or before the 18th day after the end of each delivery period, as his pro-rata share of the expense of the administration of Order No. 41, as amended, a sum not exceeding two cents per hundredweight, with respect to all milk purchased or received by him during each delivery period from producers, from sources other than producers, or from other handlers, or produced by him, the exact sum to be determined by the Market Administrator, subject to review by the Secretary. The Market Administrator determined that beginning with January 1, 1942 the exact sum should be one and one-half cents per hundredweight. The defendants have violated the Act and the Order, as amended, in that they have failed and refused, and still fai' and refuse, to pay such moneys to the Market Administrator for various delivery periods between August 1, 1943 and February 29, 1944 and as the result of said failure and refusal are indebted to the Market Administrator for their pro-rata share of the expense of administration of Order No. 41, as amended, in the sum of $100.17 as of March 18, 1944.

26 XII.

Section 941.10 of Order No. 41, as amended, requires each handler in making payments to producers, with respect to all milk received from each producer during each delivery period, at a plant not operated by a cooperative association of which such producer is a member, to deduct three cents per hundredweight, or such lesser amount as the Market Administrator shall determine to be sufficient, such determination to be subject to review by the Secretary; and requires each handler to pay such deductions to the Market Administrator for marketing services, on or

before the 18th day after the end of each delivery period. The Market Administrator determined that commencing January 1, 1942 the exact sum to be deducted and remitted for such services should be two cents per hundredweight.

The defendants have violated the Act and the Order, as amended, in that they have failed and refused, and still fail and refuse, to pay such deductions to the Market Administrator for various delivery periods between August 1, 1943 and February 29, 1944 and as a result of such failure and refusal are indebted to the Market Administrator in the sum of $172.22 as of March 18, 1944.

Wherefore Plaintiff Demands:

4. That the court issue a mandatory injunction commanding the defendants Joseph Ruzicka and Charles Ruzicka, co-partners doing business as Seeley Dairy, to comply fully with all of the provisions of Order No. 41, as amended, order regulating the handling of milk in the Chicago, Illinois, marketing area, and particularly to make all payments due and owing the Market Administrator for the periods beginning April 1, 1942 to the date of entry of judgment herein.

5. That the court issue a permanent injunction enjoining and restraining the defendants, and each of them, 27 their agents, attorneys, employees and assigns, and all persons acting in concert with them, or under them, or in their behalf, or claiming to so act, from violating any of the provisions of Order No. 41, as amended, regulating the handling of milk in the Chicago, Illinois, marketing area.

6. That the plaintiff be given all such other, further, and different relief as the court may deem just and proper.

United States of America
By *J. Albert Woll*
J. Albert Woll
United States Attorney
Chicago, Illinois

S. E. Paul
S. E. Paul
Regional Attorney
U. S. Department of Agriculture
Chicago, Illinois

John J. Toohey
John J. Toohey, Attorney
U. S. Department of Agriculture
Chicago, Illinois

28 AFFIDAVIT.

State of Illinois
County of Cook } ss.
City of Chicago

Herbert H. Erdmann, being first duly sworn, deposes and says that he is Acting Market Administrator designated by the War Food Administrator to administer the provisions of Order No. 41 as originally issued and as subsequently amended, Order regulating the handling of milk in the Chicago, Illinois, marketing area; that he makes this affidavit on behalf of the plaintiff in the foregoing supplementary complaint; that he has read the foregoing supplementary complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

H. H. Erdmann

Subscribed and sworn to before me, a Notary Public, in and for the County of Cook, State of Illinois, this 20th day of March, 1944.

s/ J. H. Kramer
(Seal) Notary Public, Cook County, Ill.
My commission expires 7/6/46

29 EXHIBIT "E".

Order No. 41, as Amended, Amendment No. 2 — Effective February 1, 1943

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD DISTRIBUTION ADMINISTRATION

T. 7, Ch. IX, Code of Fed. Regs.
Marketing Orders—Part 941

ORDER AMENDING THE ORDER, AS AMENDED, REGULATING THE HANDLING OF MILK IN THE CHICAGO, ILLINOIS, MARKETING AREA.

Section
941.0 Findings and determinations
941.00 Order relative to handling
941.1 Definitions
941.4 Classification of milk
941.5 Minimum prices
941.8 Payment for milk
941.13 Agents

Authority: Amendments to §§ 941.0, 941.00, 941.1, 941.4, 941.5, 941.8, 941.13, issued under 48 Stat. 31, 670, 675; 49 Stat. 750; 50 Stat. 246; 7 U.S.C. 1940 ed. 601 et seq.

It is provided in Public Act No. 10, 73d Congress (May 12, 1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (hereinafter referred to as the "act"), that the Secretary of Agriculture of the United States (hereinafter referred to as the "Secretary") shall, subject to the provisions of the act, issue orders regulating such handling of certain agricultural commodities (including milk and its products) as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodities.

§ 941.0 Findings and Determinations. (a) Findings upon the basis of hearing record. Pursuant to the act and

the rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR. 900. 1-900.17; 6 F.R. 6570, 7 F.R. 3350), a public hearing was held upon certain proposed amendments to the tentatively approved marketing agreement, as amended, and to the order, as amended, regulating the handling of milk in the Chicago, Illinois, marketing area. Upon the basis of the evidence introduced at such hearing and the record thereof, it is hereby found that:

(1) The aforesaid order, as amended and as hereby amended, and all of the terms and conditions of said order, as amended and as hereby amended, will tend to effectuate the declared policy of the act;

(2) The prices calculated to give milk produced for sale in the Chicago, Illinois, marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to §§ 2 and 8(e) of the act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supplies of and demand for such milk, and the minimum prices set forth in the aforesaid order, as amended and as hereby further amended, are such prices as will reffect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The aforesaid order, as amended and as hereby further amended, regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial and commercial activity specified in, the aforesaid tentatively approved marketing agreement, as amended, upon which a hearing has been held.

The foregoing findings are supplementary and in addition to the findings made in connection with the issuance of the aforesaid order, and the findings made in connection with the issuance of each of the previously issued amendments thereto; and all of said previous findings are hereby ratified and affirmed except insofar as such findings may be in conflict with the findings herein set forth.

(b) Determinations. It is hereby determined that handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping milk covered by the aforesaid order, as amended and as hereby further amended) of at least 50 percent of the volume of milk covered by said order, as amended and as hereby further amended, which is marketed within the

Chicago, Illinois, marketing area, refused or failed to sign the tentatively approved marketing agreement, as amended, regulating the handling of milk in the Chicago, Ill., marketing area; and it is further determined that:

(1) The refusal or failure of such handlers to sign said tentatively approved marketing agreement, as amended, tends to prevent the effectuation of the declared policy of the act;

(2) The issuance of this order further amending the order, as amended, is the only practical means, pursuant to the declared policy of the act, of advancing the interests of producers of milk which is produced for sale in the Chicago, Illinois, marketing area; and

(3) The issuance of this order, further amending the aforesaid order, as amended, is approved or favored by at least two-thirds of the producers who participated in a referendum on the question of the approval of this order and who, during the determined representative period, were engaged in the production of milk for sale in said Chicago, Illinois, marketing area.

§ 941.00 Order relative to handling. It is, therefore, ordered that, from and after the effective date hereof, the handling of milk in the Chicago, Illinois, marketing area shall be in conformity to and in compliance with the terms and conditions of the aforesaid order, as amended and as hereby further amended; and the aforesaid order, as amended, is hereby further amended in the following respects:

(a) Delete § 941.1(a) (11) and substitute therefor the following:

(11) The term "Secretary" means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture who is, or who may hereafter be, authorized to exercise the powers and to perform the duties of the Secretary of Agriculture of the United States.

(b) Delete § 941.4(b) (3) and substitute therefor the following:

(3) Class III milk shall be all milk the butterfat from which is used to produce a milk product other than one of those specified in Class II and Class IV, and all bulk milk and bulk cream disposed of to bakeries, soup companies, and candy manufacturing establishments.

(c) Delete § 941.5(a) (4) and substitute therefor the following:

(4) Class III Milk—The price per hundredweight for milk containing 3.5 percent butterfat during each delivery period shall be the average, computed by the market administrator, of prices, as reported by the United States Department of Agriculture, paid during such delivery period to farmers at each of the manufacturing plants or places listed in this subparagraph for which prices are reported, but in no event shall such price be less than the price computed pursuant to subparagraph (5) of this paragraph.

Location of Manufacturing Plants and Places.

Mt. Pleasant, Michigan	Berlin, Wisconsin
Sparta, Michigan	Richland Center, Wisconsin
Hudson, Michigan	Oconomowoc, Wisconsin
Wayland, Michigan	Jefferson, Wisconsin
Coopersville, Michigan	New Glarus, Wisconsin
Greenville, Wisconsin	Belleville, Wisconsin
Black Creek, Wisconsin	New London, Wisconsin
Orfordville, Wisconsin	Manitowoc, Wisconsin
Chilton, Wisconsin	West Bend, Wisconsin

(d) Delete § 941.5(b) and substitute therefor the following:

(b) Basic formula price to be used in determining Class I and Class II prices. The basic formula price to be used in determining the prices per hundredweight of Class I and Class II milk, set forth in this section, shall be the price for Class III milk determined pursuant to paragraph (a) (4) of this section, the price for Class IV milk determined pursuant to paragraph (a) (5) of this section, or that derived from the following formula, whichever is the highest:

(1) Multiply the average wholesale price per pound of 92-score butter at Chicago for the delivery period as reported by the United States Department of Agriculture, by six (6);

(2) Add 2.4 times the average weekly prevailing price per pound of "Twins" during the delivery period on the Wisconsin Cheese Exchange at Plymouth, Wisconsin: Provided, That if the price of "Twins" is not quoted on the Wisconsin Cheese Exchange the weekly prevailing price of "Cheddars" shall be deemed to be the prevailing price for "Twins" and shall be used in determining the price pursuant to this formula;

(3) Divide by seven (7), the sum so determined being hereafter referred to in this paragraph as the "combined butter and cheese value";

(4) To the combined butter and cheese value add 30 percent thereof; and

(5) Multiply the sum computed in subparagraph (4) of this paragraph by 3.5.

(e) Delete § 941.8(c) and substitute therefor the following:

(c) Butterfat differential to producers. For each one-tenth of 1 percent above or below 3.5 percent in average butterfat content of milk delivered by any producer during any delivery period, the uniform price paid to such producer shall be plus or minus, as the case may be, an amount computed as follows: to the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which the milk was received, add 20 percent and divide the result obtained by 10.

(f) Add as § 941.13 the following:

§ 941.13 Agents. The Secretary may, by designation in writing, name any officer or employee of the United States, or name any bureau or division of the United States Department of Agriculture, to act as his agent or representative in connection with any of the provisions hereof.

Issued at Washington, D. C., this 23rd day of January 1943, to be effective on and after the 1st day of February 1943. Witness my hand and the official seal of the Department of Agriculture.

/s/ Paul H. Appleby
Acting Secretary of Agriculture

Approved: Jan. 27, 1943

/s/ James F. Byrnes
Director of Economic Stabilization

30 EXHIBIT "F".

TITLE 7—AGRICULTURE

CHAPTER IX—FOOD DISTRIBUTION ADMINISTRATION

PART 941—MILK IN THE CHICAGO, ILLINOIS, MARKETING AREA

ORDER SUSPENDING CERTAIN PROVISIONS OF THE ORDER, AS AMENDED, REGULATING THE HANDLING OF MILK IN THE CHICAGO, ILLINOIS, MARKETING AREA.

Pursuant to the applicable provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1940 ed. 601 et seq.), hereinafter referred to as the "act," and of the order, as amended, regulating the handling of milk in the Chicago, Illinois, marketing area, it is hereby determined that the provision of such order which provides seasonal minimum prices for Class I milk during the months of May and June 1943, is a provision which obstructs and does not tend to effectuate the declared policy of the act with respect to producers of milk under such order.

It Is, Therefore, Ordered that, effective as of 12:01 a.m., c.w.t., May 1, 1943, the following provisions of section 941.5(a) (2) of the order, as amended, regulating the handling of milk in the Chicago, Illinois, marketing area, are hereby suspended:

"except the delivery periods of May and June," and

"and during the delivery periods of May and June the price per hundredweight for Class I milk shall be the price determined pursuant to paragraph (b), plus 50 cents."

Done at Washington, D. C., this 23rd day of April 1943.

Witness my hand and seal of the Department of Agriculture.

/s/ Claude R. Wickard

Secretary of Agriculture

31 EXHIBIT "G".

Amendment to Various Orders Effective June 21, 1943

WAR FOOD ADMINISTRATION

FOOD DISTRIBUTION ADMINISTRATION

T. 7, Ch. IX, Code of Fed. Regs. Marketing Orders

ORDER AMENDING THE ORDERS, AS AMENDED, REGULATING THE HANDLING OF MILK IN VARIOUS MARKETING AREAS.

Findings and determinations. (a) *Findings upon the basis of the hearing record.* Pursuant to Public Act No. 10, 73d Congress (May 12, 1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (hereinafter referred to as the "act"), and the rules of practice and procedure covering the formulation of marketing agreements and milk orders (7 CFR, 1941 Supp. 900.1-900.17; 7 F.R. 3350; 8 F.R. 2815) a public hearing was held upon a certain proposed amendment to each of the tentatively approved marketing agreements, as amended, and to each of the orders, as amended, regulating the handling of milk in the marketing areas hereinafter specified. Upon the basis of the evidence introduced in such hearing and the record thereof, it is hereby found that:

(1) The orders hereafter specified regulating the handling of milk in the respective areas covered thereby, as amended and as hereby amended, and all of the terms and conditions of said orders, as amended and as hereby amended, will tend to effectuate the declared policy of the act:

(2) The prices calculated to give milk produced for sale in each of said marketing areas a purchasing power equivalent to the purchasing power of such milk as determined

pursuant to sections 2 and 8 (e) of the act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supplies of and demand for such milk, and the minimum prices specified in each of the aforesaid orders, as amended and as hereby further amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) Each of the aforesaid orders, as amended and as hereby further amended, regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial and commercial activities specified in the aforesaid tentatively approved marketing agreements, as amended, upon which a hearing has been held.

The foregoing findings are supplementary and in addition to the findings made in connection with the issuance of the aforesaid orders, respectively, and the findings made in connection with the issuance of each of the previously issued amendments thereto; and all said previous findings are hereby ratified and affirmed except insofar as such findings may be in conflict with the findings herein set forth.

32 (b) *Determinations.* It is hereby determined that handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping milk covered by the aforesaid orders, as amended and as hereby further amended) of at least fifty percent of the volume of milk covered by said orders, respectively, as amended and as hereby further amended, which is marketed within the respective marketing areas, refused or failed to sign the tentatively approved marketing agreement, as amended, regulating the handling of milk in their respective marketing areas; and it is hereby further determined that:

(1) The refusal or failure of such handlers to sign such tentatively approved marketing agreements, as amended, tends to prevent the effectuation of the declared policy of the act;

(2) The issuance of this order further amending the said orders, as amended, is the only practical means, pursuant to the declared policy of the act, of advancing the interests of producers of milk which is produced for sale in the respective marketing areas; and

(3) The issuance of this order further amending the aforesaid orders, as amended, is approved or favored by at least two-thirds of the producers who, during the month of April 1943 (which month is hereby determined to be a representative period), were engaged in the production of milk for sale in their respective marketing areas.

Order Relative to Handling

It is hereby ordered, that such handling of milk in each of the marketing areas hereinafter specified as is in the current of interstate commerce or as directly burdens, obstructs, or affects interstate commerce shall, from the effective date hereof, be in compliance with the terms and conditions of the orders regulating the handling of milk in the respective areas, as amended and as hereby further amended; and the orders hereafter specified are hereby respectively further amended by adding to each of the said orders, as hereinafter specified, the following section:

Emergency price provision. Whenever the provisions hereof require the market administrator to use a specific price (or prices) for milk or any milk product for the purpose of determining class prices or for any other purpose, the market administrator shall add to the specified price the amount of any subsidy, or other similar payment, being made by any Federal agency in connection with the milk, or product, associated with the price specified: *Provided*, That if for any reason the price specified is not reported or published as indicated, the market administrator shall use the applicable maximum uniform price established by regulations of any Federal agency plus the amount of any such subsidy or other similar payment. *Provided further*, That if the specified price is not reported or published and there is no applicable maximum uniform price, or if the specified price is not reported or published and the Secretary determines that the market price is below the applicable maximum uniform price, the market administrator shall use a price determined by the Secretary to be equivalent to or comparable with the price specified.

33 Said section is hereby incorporated in the following orders:

Part 941—Milk in the Chicago, Illinois, marketing area as § 941.14

Part 965—Milk in the Cincinnati, Ohio, marketing area as § 965.15

Part 954—Milk in the Duluth-Superior marketing area as § 954.13
Part 932—Milk in the Fort Wayne, Indiana, marketing area as § 932.11
Part 920—Milk in the La Porte County, Indiana, marketing area as § 920.11
Part 946—Milk in the Louisville, Kentucky, marketing area as § 946.12
Part 942—Milk in the New Orleans, Louisiana, marketing area as § 942.13
Part 944—Milk in the Quad Cities (Illinois-Iowa) marketing area as § 944.12
Part 903—Milk in the St. Louis, Missouri, marketing area as § 903.14
Part 930—Milk in the Toledo, Ohio, marketing area as § 930.12
Part 904—Milk in the Greater Boston, Massachusetts, marketing area as § 904.12
Part 912—Milk in the Dubuque, Iowa, marketing area as § 912.15
Part 947—Milk in the Fall River, Massachusetts, marketing area as § 947.13
Part 913—Milk in the Greater Kansas City marketing area as § 913.16
Part 934—Milk in the Lowell-Lawrence, Massachusetts, marketing area as § 934.12
Part 935—Milk in the Omaha-Council Bluffs marketing area as § 935.15
Part 961—Milk in the Philadelphia, Pennsylvania, marketing area as § 961.10
Part 948—Milk in the Sioux City, Iowa, marketing area as § 948.14
Part 945—Milk in the Washington, D. C., marketing area as § 945.15

(48 Stat. 31, 670, 675; 49 Stat. 750; 50 Stat. 246; 7 U.S.C. 1940 ed. 601 et seq.; E. O. 9334, 8 F. R. 5423)

Issued at Washington, D. C., this 12th day of June, 1943.
To be effective on and after the 21st day of June 1943.

/S/ Chester C. Davis
War Food Adminstrator

Approved: June 17, 1943

/S/ Fred M. Vinson
Director of Economic Stabilization

34 And afterwards on, to wit, the 8th day of May, 1944, came the Defts. Joseph Ruzicka and Charles Ruzicka by their attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit: Filed May 8, 1944

35 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 4670) * *

ANSWER OF JOSEPH RUZICKA AND CHARLES RUZICKA TO SUPPLEMENTAL COMPLAINT.

Now come the defendants, Joseph Ruzicka, and Charles Ruzicka, by William Parker Ward, their attorney and agent in their behalf and for their answer to the supplemental complaint herein state as follows:

VII.

Defendants admit that Frank Ruzicka entered the service of the Armed Forces of the United States on April 1, 1942; defendants admit that this court ordered the cause based on the original complaint withdrawn from the trial call until such time as the defendant, Frank Ruzicka, is released from the Military Service of the United States but defendants state in the alternative that said order of the court provided that all transactions prior to the date of said
36 order to wit: June 25, 1943, were to be held in abeyance until the return of the said Frank Ruzicka; defendants further state in the alternative that all matters in controversy for acts and transactions prior to the said date were not to be litigated or determined by this court until the return of the said Frank Ruzicka; defendants have no knowledge of the purpose for which the said supplemental complaint has been filed but demand strict proof of all allegations of the plaintiff.

VIII.

These defendants admit the issuance of certain purported orders and amendments to orders and suspensions of orders of the Secretary of Agriculture and of the person

entitled War Food Administrator purporting to regulate the handling of milk and milk products in the Chicago, Illinois, marketing area as is in the current of interstate commerce or as directly burdens, obstructs or affects interstate commerce; defendants allege that the orders, amendments and suspensions referred to herein are invalid and void; that said orders, amendments and suspensions are unreasonable, capricious, vague, uncertain, contradictory and unjust and allege in the alternative that if said orders, amendments and suspensions are determined by this Honorable Court either in this proceeding or by a similar court of competent jurisdiction in a proceedings to review a finding or determination under the administrative proceedings provided for in the said act and amendments to be applicable to the business operations of these defendants that the application of said orders, amendments and suspensions would irreparably harm and injure these defendants: defendants further state that the operations under said orders are impossible in fact and economically unsound and thereby defeat the declared purposes of the acts and or-
37 ders referred to; these defendants admit that the two of them; namely, Joseph Ruzicka and Charles Ruzicka, are presently engaged in a dairy business involving the processing and distribution of milk and milk products in the City of Chicago, County of Cook and State of Illinois but allege that said operations involve the use of the capital investment and assets of the partnership composed of the three following persons in equal shares: Joseph Ruzicka, Frank Ruzicka and Charles Ruzicka; that said three partners investment and business is conducted under the name "Seeley Dairy"; defendants further state that they had no knowledge or no means of acquiring knowledge of the existence of competition of their business activities with those of other milk dealers whether said other dealers come within the definition "handlers" as provided in said orders, etc. and, therefore, deny the allegations; defendants have no information nor means of acquiring information concerning the interstate aspect of the movement of the milk or milk products handled by them or the effect of their business activities as to directly burden, obstruct or affect interstate commerce in milk and its products and for want of such knowledge and information neither affirm nor deny the allegations with reference thereto but demand strict proof of the plaintiff thereof.

IX.

These defendants admit the issuance of said orders and orders as amended as alleged but deny the applicability of the provisions referred to to these two defendants or to their business activities; defendants state in the alter-
38 native that they believe according to their best information that any billing by the market administrator located at Chicago, Illinois, if properly made and applicable to these two defendants was based upon an erroneous, improper, incomplete and inaccurate inspection or audit of the defendants' accounts, books, records and activities of their transactions and upon findings gathered from and based upon erroneous, improper, incomplete and inaccurate tests of the defendants milk and milk products.

X.

These defendants admit the issuance of said orders and orders as amended as alleged but deny the applicability of the provisions referred to to these two defendants or to their business activities; defendants state in the alternative that they believe according to their best information and knowledge that any billing by the market administrator located at Chicago, Illinois, if properly made and applicable to these two defendants was based upon an erroneous, improper, incomplete and inaccurate inspection or audit of the defendants' accounts, books, records and activities of their transactions.

XI.

These defendants admit the issuance of said orders and orders as amended as alleged but deny the applicability of the provisions referred to to these two defendants or to their business activities; defendants state in the alternative that they believe according to their best information and knowledge that any billing by the market administrator located at Chicago, Illinois, if properly made and applicable to these two defendants was based upon
39 an erroneous, improper, incomplete and inaccurate inspection or audit of the defendants' accounts, books, records and activities of their transactions; defendants state in the alternative that the operation of the said order purporting to equitably regulate the handling of milk in the Chicago, Illinois, milk shed is a part of a program of the Federal Government through the activities of various

agencies, to-wit: the Office of the Secretary of Agriculture, the War Food Administration, the Food Distribution Administration, the Office of Price Administration, the Office of Economic Stabilization and the Office of War Mobilization; that said program is governmental in nature and the costs and expenses of such program should be borne by the Federal Government through general taxation and that said costs and expenses should not be borne by this or any other milk dealer whether within the definition "handler" as used in said orders and amendments, and is not a proper method of taxation against these persons; that since the said defendants have had no voice nor opportunity to be heard in the administration of the said program through any of the said Federal agencies involved this attempt at collection of the costs and expenses of the administration of said program amounts to taxation without representation and is tantamount to the taking of property without due process of law in violation of the Federal Constitution.

XII.

These defendants admit the issuance of said orders and orders as amended as alleged but deny the applicability of the provisions referred to to these two defendants or to their business activities; defendants state in the alternative that they believe according to their best information and knowledge that any billing by the market administrator located at Chicago, Illinois, if properly made and applicable to these two defendants was based upon an erroneous, improper, incomplete and inaccurate inspection or audit of the defendants' accounts, books, records and activities of their transactions.

XIII.

These defendants further answering the said supplemental complaint state:

A. These defendants admit that several orders purporting to equitably and fairly regulate and supervise the business activities of the milk and milk products industries in the City of Chicago, County of Cook and State of Illinois, have been published as orders of the Secretary of Agriculture; defendants deny the validity of the issuance of the said orders and amendments, said orders and amended orders being promulgated upon insufficient inaccurate facts as to the economic status of agriculture, the credit of farm

income and the movement of milk and milk products in interstate commerce.

B. Defendants state that the economic foundation for the existence of the orders referred to herein has been altered since the issuance of said order and order as amended; that the declaration of the Secretary of Agriculture that said economic foundation for the existence of said order and order as amended referred to herein has been a mere recitation by the Secretary of Agriculture and has not been based upon a complete and thorough investigation of the actual facts which would reveal said economic conditions; that the declared policy of Congress as set forth in the act has not and is not being achieved by the continued
41 existence of the said order and order as amended in this area; that the defendants verily believe that there is no longer any basis in fact or in law for the continued existence of this order and order as amended; that these defendants verily believe that on the contrary the continued existence of the order and order as amended obstructs, burdens and affects intrastate and interstate commerce in this area and tends to destroy the national credit structure.

C. Defendants state that they verily believe that the operation in the City of Chicago, County of Cook and State of Illinois of the said order and order as amended is in direct conflict with the declared policy of the President of the United States said policy being commonly referred to as the "Hold the Line" policy and is in direct conflict with the orders and anti-inflation directives of James F. Byrnes as director of War Mobilization of the Federal Government; that the continued existence and attempted operation of the said order and order as amended is in direct conflict with and in violation of the declared economic policy of the Office of Price Administration of the Federal Government; that there has been a failure of cooperation between the various agencies of the Federal Government entrusted with the responsibility of carrying out the various aspects of the milk and milk products industries program of the Federal Government as administered by the Office of the Federal Milk Market Administrator in Chicago, the Office of War Food Administration, the Office of Economic Stabilization, the Office of War Mobilization and the Office of Price Administration all of the Federal Government to the prejudice of the milk and milk products

industries throughout the nation and specifically in the City of Chicago, County of Cook and State of Illinois;
42 that the plaintiff herein by reason of the failure of the cooperation and failure of economic foundation and by reason of the violation by the plaintiff of the declared economic policies of the President of the United States and said Federal offices said failure of cooperation and of economic foundation and violations having existed continuously since the creation of said offices of the said Government ought not to have any relief whatsoever from these defendants at the present time for transactions occurring since and during said violations by the plaintiff.

D. Defendants state that the Agricultural Adjustment Act of 1933 as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 provides for an administrative hearing as to the determination by the Secretary of Agriculture of the matters and problems concerning the applicability of the said order and order as amended; that there has been no determination by the Secretary of Agriculture under the applicable provisions of the said acts as to the applicability and operation of the said order and order as amended as to these defendants.

Wherefore, the defendants, Joseph Ruzicka and Charles Ruzicka pray as follows:

A. That the Specific and general relief sought by the plaintiff be denied.

B. That this complaint be dismissed.

C. That these defendants have judgment for their costs most wrongfully sustained.

D. That the Secretary of Agriculture and all those
43 acting in concert with him or under his direction and supervision be permanently restrained and enjoined from the attempted application of the said order and order as amended as to each of these defendants.

E. That the court dismiss this complaint and this supplemental complaint for lack of equity.

F. That the plaintiff establish and show the basis in law and in fact of the application of the said acts and orders to these defendants.

G. That the plaintiff establish and show the basis in law and in fact for the reenactment and issuance of the said order and order as amended.

H. That the plaintiff establish and show the basis in law and in fact of the continued existence of the said order and order as amended.

I. For such other and further relief as the court deems meet.

Joseph Ruzicka and
Charles Ruzicka
By *William Parker Ward*,
William Parker Ward,
their attorney.

44 State of Illinois } ss:
County of Cook }

William Parker Ward being duly sworn upon oath deposes and says that he is the attorney for the defendants, Joseph Ruzicka and Charles Ruzicka; that he is their duly authorized agent in this behalf; that he makes this affidavit on behalf of the defendants in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

William Parker Ward.

Subscribed and sworn to before me, a notary public, in and for the State of Illinois, County of Cook, this 8th day of May, 1944.

Mary Costello, *Notary Public.*
(Seal)

45 And afterwards on, to wit, the 28th day of June, 1944 came the Defts. Joseph Ruzicka, *et al.* by their attorney and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit: Filed June 28, 1944

46 In the District Court of the United States
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 4670) * *

PETITION.

Now come the defendants, Joseph Ruzicka and Charles Ruzicka, by William Parker Ward, their attorney and

agent in their behalf and petition this Honorable Court as follows:

1. That they are several of the co-partners of the firm known as Seeley Dairy of the City of Chicago, County of Cook and State of Illinois; that they have heretofore filed an answer to the complaint of the plaintiff and an answer to the supplemental complaint of the plaintiff.

2. That this action arises under the provisions of the Agricultural Marketing Agreement Act of 1937 and amendments; that said act provides for an administrative determination by persons or parties to whom said act and amendments is or is sought to be applied; that by virtue of the said provisions your petitioners have heretofore on the 28th day of October, 1943, and again on the 29th day of April, 1944, presented their petition in writing to Claude R. Wickard, Secretary of Agriculture, United States of America, requesting an administrative determination through a hearing as to the matters in controversy between the plaintiff and these defendants; that the receipt of said petition has been acknowledged by the office of the solicitor of the United States Department of Agriculture, at Washington, D. C., and has been designated as AMA Docket No. 4122; that to date hereof no hearing has been held and no date has been set for the said hearing although request has been made for a hearing at the earliest time possible; that said administrative proceedings are for the purpose of securing a complete administrative determination of the validity, propriety and applicability of the Order No. 41 of the Secretary of Agriculture referred to in the plaintiff's complaint herein.

3. That said proceedings before the Secretary of Agriculture will result in the only fair determination of the rights according to the provisions of said act; that a determination in this court of such matters as marketing conditions, practices and principles would preclude petitioners from seeking the administrative relief guaranteed them by the said act; that said hearing will result in the determination of the applicability of the said order and act to these petitioners; that in the event said act and order is applicable to these petitioners said hearing will also afford a full and complete hearing as to the amount of monies, if any, due to the funds administered by the Market Administrator at Chicago, Illinois under the said Order No. 41.

47 Wherefore, your petitioners pray that said proceedings before this Honorable Court be stayed until such time as the Secretary of Agriculture has made a final determination after a full and complete hearing of the matters presented in the said petition under the administrative process provisions of the said act.

Joseph Ruzicka and
Charles Ruzicka
By *William Parker Ward*
William Parker Ward
their attorney

State of Illinois } ss.
County of Cook }

William Parker Ward being first duly sworn, on oath deposes and says that he is the attorney for the defendants, Joseph Ruzicka and Charles Ruzicka; that he is their duly authorized agent in this behalf; that he makes this affidavit on behalf of the defendants in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

William Parker Ward

Subscribed and sworn to before me a Notary Public, in and for the State of Illinois, County of Cook, this 26th day of June, 1944.

Helen Bozarth
Notary Public.

(Seal)

Filed Sept. 25, 1944

48 And afterwards on, to wit, the 25th day of September, 1944, came the Plaintiff by United States attorney and filed in the Clerk's office of said Court a certain Motion for Judgment on the Pleadings in words and figures following, to wit:

49 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 4670) * *

MOTION FOR JUDGMENT ON THE PLEADINGS.

The plaintiff, United States of America, moves for judgment on the pleadings against all of the above-named defendants, pursuant to the provisions of Rule 12(c) of the Federal Rules of Civil Procedure.

J. Albert Woll
J. Albert Woll,
United States Attorney,
Attorney for the Plaintiff.

NOTICE.

To.: William Parker Ward, Esquire
10 South LaSalle Street
Chicago, Illinois
Attorney for the Defendants.

Please Take Notice that I shall bring the above motion on for hearing on September 25, 1944, at 10:00 o'clock A. M., before the Honorable Michael L. Igoe, Judge of the District Court, in the courtroom usually occupied by him in the United States Court House, Chicago, Illinois.

J. Albert Woll
J. Albert Woll,
United States Attorney

50 State of Illinois }
County of Cook } ss

AFFIDAVIT OF MAILING.

Lawrence E. Schuble, being first duly sworn on his oath, doth depose and say that he is employed as a Messenger in the office of the United States Attorney at Chicago, Illinois; that on the 21st day of September, 1944, he placed a copy of the foregoing Motion for Judgment on the Pleadings, together with Notice thereon, in a Government-franked envelope, addressed to the following:

William Parker Ward, Esquire
10 South LaSalle Street
Chicago 3, Illinois

and that he placed said envelope, so addressed and containing the aforementioned documents, in the United States mail chute located in the United States Court House, Chicago, Illinois, on said date.

Lawrence E. Schuble

Subscribed and sworn to before me this 21st day of September, 1944.

John Peter Lulinski
(Seal) *Notary Public.*

51 And afterwards on, to wit, the 16th day of October, 1944, came the Defts. Joseph Ruzicka and Charles Ruzicka, by their attorney and filed in the Clerk's office of said Court a certain Motion for Rule on Plaintiff, etc. in words and figures following, to wit: Filed Oct. 16, 1944

52 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 4670) * *

MOTION.

Now comes the defendants, Joseph Ruzicka and Charles Ruzicka, several of the partners of the firm of Seeley Dairy and moves the Court for a rule on the plaintiff to

file its reply within such time as may be determined by the Court to the Answer of Joseph Ruzicka and Charles Ruzicka to the Supplemental Complaint filed the 8th day of May, 1944, wherein the plaintiff shall be required to make full and complete Answer to the affirmative allegations of the said Answer to the said Supplemental Complaint.

Joseph Ruzicka and Charles Ruzicka
several of the partners of the firm
Seeley Dairy

By William Parker Ward
Their Attorney.

Filed Oct. 16, 1944

53 And on the same day, to wit, the 16th day of October, 1944, came the Defts. Joseph Ruzicka, et al. by their attorney and filed in the Clerk's office of said Court a certain Motion for Rule on Plaintiff, etc., in words and figures following, to wit:

54 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

(Caption—No. 4670)

MOTION.

Now comes the defendants, Joseph Ruzicka and Charles Ruzicka, several of the partners of the firm of Seeley Dairy, and moves the Court as follows:

1. For a rule upon the plaintiff to file within such time as may be fixed by this Court a list of the names and present addresses of each and every auditor or accountant of the Milk Market Administrator at Chicago, Illinois, who inspected, audited or investigated the books and records of these several defendants and of the auditors or accountants who summarized said reports used in billing by said Market Administrator of any monies allegedly due funds administered by him.

2. For a rule on the plaintiff to file within such time as may be fixed by the Court a list of the names and addresses of the persons who collected, prepared and made tests as to the butter fat content of the milk and milk

products of these several defendants for the period of time alleged in said supplemental complaint.

Joseph Ruzicka and Charles Ruzicka
several of the partners of the firm
Seeley Dairy
By William Parker Ward
Their Attorney.

55 And on the same day, to wit, the 16th day of October, 1944, came the Defts. Joseph Ruzicka, *et al.* by their attorneys and filed in the Clerk's office of said Court a certain Motion for Rule on Plaintiff, etc. in words and figures following, to wit: Filed Oct. 16, 1944

56 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—No. 4670)

MOTION.

Now comes the defendants, Joseph Ruzicka and Charles Ruzicka, several of the partners of the firm of Seeley Dairy, and moves the court:

(1) For a rule on the plaintiff, within such time as may be fixed by the Court, to file a Bill of Particulars as to the amount of monies, if any, claimed by the plaintiff;

(2) For a rule on the plaintiff, within such time as may be fixed by the Court, to file a Bill of Particulars as to the amount of monies allegedly due, itemizing:

(a) The particular fund to which each amount is allegedly due;

(b) The months during which said alleged obligation arose as to each fund;

(c) The basis of the amount claimed as allegedly due each fund for each month thereof.

(3) For a rule on the plaintiff, within such time as may be fixed by the Court, to file a Bill of Particulars as to the butter fat content tests made by or under the direction of the Milk Market Administrator at Chicago, Illinois, as to any and all milk and milk products of these defendants for the period or periods during which the

plaintiff alleges monies due the funds administered by the Milk Market Administrator at Chicago, Illinois.

57 Joseph Ruzicka and Charles Ruzicka
several of the partners of the firm
Seeley Dairy
By William Parker Ward
Their Attorney.

Filed Oct. 16, 1944

58 And on the same day, to wit, the 16th day of October, 1944, came the Defts. Joseph Ruzicka, *et al.* by their attorney and filed in the Clerk's office of said Court a certain Motion to Strike, in words and figures following, to wit:

59 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—No. 4670)

MOTION.

Now comes the defendants, Joseph Ruzicka and Charles Ruzicka, several of the partners of the firm of Seeley Dairy and moves the Court to strike the motion for judgment on the pleadings heretofore filed on the 25th day of September, 1944, in accordance with the petition of Joseph Ruzicka and Charles Ruzicka.

Joseph Ruzicka and Charles Ruzicka
several of the partners of the firm
Seeley Dairy
By William Parker Ward
Their Attorney.

60 And on the same day, to wit, the 16th day of October, 1944, came the Defts. Joseph Ruzicka, et al. by their attorney and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit: Filed Oct. 16, 1944

61 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 4670) * *

PETITION.

To the Honorable Judges of Said Court:

Now comes the defendants, Joseph Ruzicka and Charles Ruzicka, several of the partners of the firm Seeley Dairy, by William Parker Ward, and for their petition in support of their motion to strike the motion of the plaintiff for judgment on the pleadings, say as follows:

1. That your petitioners are several, but not all of the partners of the firm Seeley Dairy, of Chicago, Illinois; that there are three (3) partners who hold equal shares in the ownership of said firm; that one of said partners, Frank Ruzicka, is not a party to this action and has not been served with process for the reason that said Frank Ruzicka has been and is now a member of the armed forces of the United States, serving specifically with the United States Naval Reserve; that this court has heretofore, on the 25th day of June, 1943, protected the equitable interest of this third partner, Frank Ruzicka, by removing from the trial call this action based upon the original complaint filed herein; that said Frank Ruzicka has been continually since that date a member of the United States Naval
62 Reserve, serving outside of the territorial limits of the United States.

2. That said motion for judgment on the pleadings, heretofore filed by the plaintiff herein, seeks action against each and every one of the partners, including the partner not served and not a party to this action.

3. That plaintiff, by and through its supplemental complaint heretofore filed herein on the 10th day of April, 1944, alleges certain monies due, not to the plaintiff but

to the funds administered by the Milk Market Administrator at Chicago, Illinois.

4. That the answer of these two partners of the firm Seeley Dairy to the supplemental complaint filed on the 8th day of May, 1944, denies that any monies whatsoever are due to the said funds and inter alia states affirmative defenses and prays for counter relief against the plaintiff.

5. That no other pleadings to date hereof has been filed by the plaintiff or these defendants herein; that the record of this Court therefore presents an issue of fact as to the question of monies allegedly due these funds.

6. That by reason of said issue of facts as to the payment of monies, no judgment or decree in this Court of Equity could be entered upon pleadings at this date.

63 Wherefore, your petitioners pray that the motion to strike the motion of the plaintiff for judgment on the pleadings against all of the partners, including the partner not a party to this action, be sustained.

Joseph Ruzicka and Charles Ruzicka
several of the partners of the firm
Seeley Dairy.

By William Parker Ward
Their Attorney

Filed Oct. 16, 1944

64 And on the same day, to wit, the 16th day of October, 1944, came the Defts. Joseph Ruzicka, et al. by their attorneys and filed in the Clerk's office of said Court a certain Motion in words and figures following, to wit:

65 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 4670) * *

MOTION.

Now comes the defendants, Joseph Ruzicka and Charles Ruzicka, several of the partners of the firm of Seeley Dairy, and moves the Court to set this cause for jury trial on a day certain as to the issues of fact concerning the payment of monies to the various funds administered by the Market

Administrator, in accordance with the petition of these defendants.

Joseph Ruzicka and Charles Ruzicka
several of the partners of the firm
Seeley Dairy.

By William Parker Ward,
Their Attorney.

66 And on the same day, to wit, the 16th day of October, 1944, came the Defts. Joseph Ruzicka, et al. by their attorney and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit: Filed Oct. 16, 1944

67 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—No. 4670) * *

PETITION.

To the Honorable Judges of Said Court:

Now comes the defendants, Joseph Ruzicka and Charles Ruzicka, several of the partners of the firm Seeley Dairy, by William Parker Ward, and for their petition in support of their motion to set this cause for a jury trial as to the issues of fact concerning the payment of monies, say as follows:

1. That the plaintiff has heretofore filed its supplemental complaint against these two defendants alleging that certain monies were due to funds administered by the Milk Market Administrator; that these defendants have replied thereto denying that the monies are due to the said funds; that no other pleadings have been filed herein.

2. That by virtue of said Amended Complaint and Answer thereto, the allegations as to the payment of monies or as to monies due, presents an issue of fact.

3. That in accordance with the constitution of the
68 United States, and the statutes in such case made and provided, and rules of court, defendants are entitled to a jury trial as to the issues of fact concerning monies due; that pursuant to said right the defendants have heretofore filed their jury demand demanding trial by jury.

4. That these defendants are entitled to their day in court, including their right to a trial by jury, as to the monies allegedly due.

Wherefore, these defendants pray that this cause be set for jury trial on a day certain as to the issues of fact concerning payment of monies to the funds administered by the Milk Market Administrator.

Joseph Ruzicka and Charles Ruzicka
several of the partners of the firm
Seeley Dairy.

By William Parker Ward,
Their Attorney.

Filed Oct. 16, 1944

69 And on the same day, to wit, the 16th day of October, 1944 came the Defts. Joseph Ruzicka, et al by their attorney and filed in the Clerk's office of said Court a certain Motion in words and figures following, to wit:

70 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 4670) * *

MOTION.

Now comes the defendants, Joseph Ruzicka and Frank Ruzicka, several of the partners of the firm Seeley Dairy, and moves the Court for leave to withdraw the petition heretofore filed by them on the 28th day of June, 1944.

Joseph Ruzicka and Charles Ruzicka
several of the partners of the firm
Seeley Dairy.

By William Parker Ward,
Their Attorney.

71 And afterwards on, to wit, the 22nd day of January, 1945, there was filed in the Clerk's office of said Court certain Portions of Report of Proceedings and Stipulation in words and figures following, to wit:

72 Page 1.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division, at Chicago.

* * (Caption—No. 4670.) * *

Report of Proceedings at the hearing of the above entitled cause before the Honorable Michael L. Igoe, Judge of said Court, on the 16th day of October, 1944, at 2:00 o'clock P. M.

Present:

Mr. J. Albert Woll,
United State District Attorney, By
Mr. John P. Lulinski,
Asst. United States Attorney;
Mr. John J. Toohey, and
Mr. Jesse L. Cook,
On behalf of the Government;
Mr. Wm. Parker Ward,
On behalf of the Defendants.

Page 2.

The Clerk: Number 4670, United States of America vs. Joseph Ruzicka, Frank Ruzicka and Charles Ruzicka.

The Court: Proceed.

Mr. Lulinski: I believe there are some preliminary motions that should be disposed of before we get into the argument in chief on the Government's motion on the pleading.

The Court: What are they?

73 Mr. Lulinski: I served notice on them. I don't remember. There are some seven motions filed of the various named defendants.

Mr. Ward: This is here, Your Honor, on the trial call, on Defendant's motion to stay, during the pendency of the administrative proceedings and on the Plaintiff's motion for judgment on the pleadings, and now I served notice, as counsel states, and I would present several motions to Your Honor this morning, or this afternoon. I don't know whether you want to take his or if you want to take my motion before his, well and good. If you would rather take his—

The Court: This motion is on the merits?

Mr. Lulinski: That is right, Your Honor. These are various motions for a bill of particulars.

Mr. Ward: All right, starting with the first one,

Page 3. Lines 1 to 15, inclusive.

The Court: What is that?

Mr. Ward: The first is a motion by the two defendants, the two partners who have been served for leave to withdraw petition filed by them on the 28th day of June, 1944.

The Court: What is that?

Mr. Ward: That was a petition to stay the court proceedings pending an administrative determination of certain points involved. I am not urging that point. I am asking leave to withdraw that petition.

The Court: Is there any objection to that?

Mr. Lulinski: No objection on the part of the Government, Your Honor.

The Court: That motion may be granted.

Mr. Ward reads defendants' motion asking rule on plaintiff to file Bill of Particulars and motion for rule on plaintiff to file reply to answer (Items 8 and 6, respectively, in appellants' designation of record on appeal).

74 Page 5. Lines 6 to 24, inclusive.

Mr. Ward: I do not know if there is any objection to that.

Mr. Lulinski: There is an objection to that Your Honor.

Mr. Ward: In my supplemental answer to the supplemental complaint I have set out various affirmative defenses that we are not at issue. I want some reply to that either in the nature of motions or in the nature of an answer. We certainly can't try a case until we see the issues which are presented, or until we have issues.

The Court: This was filed last May?

Mr. Ward: That is right, Your Honor. No Answer has been filed since then.

The Court: Where under the rules do they have to file an Answer?

Mr. Lulinski: That is the point involved, Your Honor.

Mr. Ward: Well, Your Honor, here, just in this,

Page 6. Lines 1 to 16, inclusive.

in the ordinary rules of proceeding in a court where a man sets up an affirmative defense and prays for affirmative relief, I think he is entitled to know whether they will either admit it or deny it.

The Court: There isn't anything in our rules that says he has to file an Answer.

Mr. Ward: I think it is discretionary with the Court at this time whether there should be an Answer.

The Court: He says you have been laboring under that misapprehension of coming in here and asking for the exercise of discretion. That motion will be overruled.

Mr. Ward: The plaintiff has had quite a while too, Your Honor. May I take exception to that?

The Court: Yes.

75 Mr. Ward reads defendants' motion to strike motion on the pleadings and defendants' petition in support of motion (Item 9 and 10, respectively in appellants' designation of record on appeal).

Page 9. Lines 11 to 24, inclusive.

Mr. Ward: Now, Your Honor, I am prepared to argue that point in detail this afternoon to show that the motion for judgment cannot be entered where there is an issue of fact present or presented by the record, especially where there is no general denial on file.

The Court: That is the whole issue, as to whether they are entitled to summary judgment?

Mr. Lulinski: I object to the motion.

Mr. Ward: I beg your pardon.

Mr. Lulinski: Go ahead.

Mr. Ward: It is not a motion for summary judgment. There is no affidavit in support. This is only a motion for judgment unsupported by even a petition.

Page 10. Lines 1 to 15, inclusive.

The Court: Yes.

Mr. Lulinski: This is a motion for judgment on the pleadings, pursuant to the rule itself.

The Court: Isn't that a summary judgment?

Mr. Lulinski: In effect a summary judgment.

The Court: It is the same thing. It is a motion for judgment upon the pleadings.

Mr. Ward: Judge, what sort of an order can be entered upon the issue except to declare the present state of proceedings is at issue?

The Court: This matter that you are now discussing is what he has come here to discuss.

Mr. Ward: I am striking his motion.

76 The Court: Set that aside for a moment. What else?

Mr. Ward reads defendants' motion asking rule on plaintiff to file list of auditors and testors (Item 7 in appellants' designation of record on appeal).

Page 11. Lines 15 to 24, inclusive.

Mr. Ward: Your Honor, this is a preliminary motion, preliminary to the trial. I want to know the names and addresses of those people. I will either take their deposition or I will subpoena them into court. They are the people who will testify against my client in the trial of this cause. I want as a matter of pre-trial preparation to have their names and addresses. This answer will revolve principally upon the payment of moneys, the amount of moneys which is due.

Page 12. Lines 12 to 20, inclusive.

Mr. Lulinski: May it please the Court, the Government's objection to the motion is founded upon the fact there is no provision within the federal rules of civil procedure providing for a rule to show cause such as filed here. Apparently the defendants are here for the purposes of discovery. We have three rules, the only federal rules of civil procedure which I believe are for discovery. They are Rules 34, 35 and 36.

Page 13. Lines 10 to 24, inclusive.

Mr. Lulinski: There is no provision, as I have heretofore stated in our Rules permitting the defendant or plain-

tiff to come in for discovery or a Rule to show cause. It must come in on one of the three special methods that we have, or otherwise file his depositions either orally or written for the purpose of discovery.

Mr. Ward: This is not a Rule to show cause, because you understand, Your Honor,—

The Court: This is a Rule upon a specific statement of claim.

77 Mr. Ward: It might be considered that. It might also be considered a motion in the nature of interrogatories. If counsel objects to it in this form I will serve it in the nature, in the form of interroga-

Page 14. Lines 1 to 18, inclusive.

tories to find out the names and addresses of these people.

The Court: What you want is discovery. That is why you should proceed under the Federal Rules.

Mr. Ward: I will withdraw that motion.

The Court: It is withdrawn then.

Mr. Ward: All right.

The Court: What is the next?

Mr. Ward: The next one, excuse me, Your Honor. I think I have evidently skipped one. There should be one here in its natural order. I do not find it.

The Court: A long one?

Mr. Ward: It is a motion for a bill of particulars, Your Honor.

The Court: Rule on the plaintiff to file a bill of particulars?

Mr. Ward: I see I got them in the reverse order here in front of me, Your Honor.

Mr. Ward reads defendants' motion asking rule on plaintiff to file Bill of Particulars (Item 8 in appellants' designation of record on appeal).

Page 16. Lines 16 to 24, inclusive.

The Court: That motion is overruled.

Mr. Ward: I would just like to remain on that point and take exception to it. On that point in an equity court I would be entitled to it, especially when it involves the administration of funds for separate periods.

The Court: You can get all that information by filing interrogatories.

78 Mr. Ward: All right, Your Honor. Now the next

Page 17. Lines 1 to 4, inclusive.

motion is, of course, predicated upon the two previous motions. Of course, you can see the point of it as soon as I bring it to Your Honor's attention. Mr. Ward reads defendants' petition in support of motion for jury trial (Item 12 in appellants' designation of record on appeal).

Page 18. Lines 17 to 24, inclusive.

The Court: You say pursuant to the right set-up here, the defendants have filed their jury demand. Where did they file it?

Mr. Ward: It was filed here on the day that the appearance was filed, Your Honor.

The Court: Where is it?

Mr. Ward: It is in the records of the Clerk of the Court. I have a copy of it here.

Page 19. Lines 1 to 19, inclusive.

The Court: I don't know why you are going to make another demand.

Mr. Ward: I have set it up here, asking that it be set for trial. Here is the demand, sets up the recital here.

The Court: I don't know where the demand is.

Mr. Ward: It says we demand a set date for a date for a jury trial.

Mr. Lulinski: I would point out the Government's observation relative to this particular motion. The proceeding, Your Honor, is an equitable proceeding. We are in equity. We are ask for equitable relief by way of mandatory injunction, by way of a restraining order.

The Court: You are not entitled to a jury.

Mr. Lulinski: That is right, Your Honor.

Mr. Ward: Your Honor, that jury demand was filed on October 13th, 1942.

The Court: You are not entitled to a jury.

79 Page 20. Lines 20 to 24, inclusive.

The Court: As I understand, this is a motion for judgment upon the pleadings?

Mr. Lulinski: That is right, Your Honor. That question will be taken up and shown in detail that these are affirmative defenses, and defenses set

Page 21. Lines 1 to 20, inclusive.

forth by the defendants and their particular answers to the supplemental complaint are not answers, and the Government is entitled to judgment on the pleadings, as they explain.

Mr. Ward: Judge, I will read you cases to show that a motion for judgment is not a proper proceeding to strike, as a matter of law.

Mr. Lulinski: It is not a question of striking. We admit the allegations. We admit the allegations. In the affirmative allegations of the answer we say: Admitting those allegations for the purposes of this motion for judgment, that notwithstanding we are entitled to judgment on the pleadings.

Mr. Ward: I don't think you mean exactly what you say, about your admitting any affirmative allegations. We complained about the equities of the plaintiff. If he admits that I am out of court right away. I have one other matter.

The Court: He says he is proceeding under—

Mr. Lulinski: Rule 12-C.

Page 57. Lines 16 to 19, inclusive.

The Court: Wasn't this case continued some months ago for the purpose of permitting them to proceed under the administrative office?

Mr. Ward: It was.

80 Page 114. Lines 11 to 24, inclusive.

The Court: What I have heard in this case, I think these defendants are just pursuing their dilatory tactics in order to prevent this matter coming to a final conclusion.

Now, we have a final motion here that you want to strike the motion for judgment on the pleading. That motion will be overruled.

As I understand your motion, Mr. United States Attorney, it is for judgment upon the pleadings.

Mr. Lulinski: That is right, Your Honor.

The Court: The only thing that is left to determine here is some mathematical process by which you will arrive at the amount of money due?

Page 115.

Mr. Lulinski: That is right, Your Honor.

The Court: They have filed returns. Upon those returns you can check by a pencil and by a mathematical process you can arrive at the amount that is due?

Mr. Lulinski: Yes.

The Court: There is a petition under the Rule of the Federal Practice here which gives summary judgment. Really the only thing left is to get at what the mathematical sum is that you are entitled to under a summary judgment?

Mr. Lulinski: That is right.

The Court: You are proceeding under Sub-Division C of Rule 12?

Mr. Lulinski: That is right.

The Court: Upon that your motion will be allowed. You draw the order up and bring it in here.

Mr. Ward: May I say this as to the amount of money which is due. Under these reports there is also another amount of money which is allegedly due by reason of
81 the audit and inspection of the defendants' business activities and their books and records. Now, on that we have squarely an issue as to whether

Page 116. Lines 1 to 7, inclusive.

or not there is any moneys due through error, but there must be a hearing and a judgment and I can't see how there can be any judgment where we are at issue as to whether the books and records have substantiated the sum of money due.

The Court: No. You are just trying to bring in another economic theory over here before a jury.

Mr. Ward: No, before the Court.

Page 117. Line 24.

The Court: Is there something else that has to be arrived

Page 118. Line 1—Lines 3 to 19, inclusive.

at before they should figure what is due there?

Mr. Lulinski: There is a verification of the audit adjustment which under the order provides he has five days to make payment. He never came in.

The Court: He has time to come in to object to the figure which you fixed?

Mr. Lulinski: He can come in today and object to the figure if he desires.

Mr. Ward: Judge, they would have to prove those figures. After all, they claim the reports were wrong, Judge. If they claim our reports are wrong, in equity they should prove where we are wrong.

The Court: In the proper proceeding, that is where you should act. You did not object.

82 Mr. Ward: They claim I have the burden of proving that my own reports are wrong.

The Court: It is up to you to come over there and set them aside.

Page 119. Line 22 and 23.

The Court: Now, we have to decide this law suit.

Mr. Ward: I wish to point out there has been no

Page 120. Lines 1 to 18, inclusive, and 22 and 23.

evidence introduced.

The Court: It is quite apparent there has been no evidence produced. He is making a motion upon the pleadings.

Mr. Ward: When will you submit the order? I would like to see the order.

Mr. Lulinski: You will be served with notice in advance.

Mr. Ward: I have a demand for a jury trial.

Mr. Lulinski: He withdrew the demand for a jury trial.

Mr. Ward: No, I did not withdraw the demand for a jury trial.

The Court: The second one?

Mr. Ward: No. That was entered.

Mr. Lulinski: No, that is not withdrawn.

The Court: Leave it in the file. He has already asked for a jury.

Mr. Ward: That is only the question as to the payment of money.

83 STIPULATION.

Attorney for the appellant and attorney for the appellee have examined the foregoing abstract of the stenographic report of the proceedings in the case of *United States of America v. Joseph Ruzicka, et al.*, Civil Action No. 4670, had before Judge Michael L. Igoe at 2:00 o'clock p. m.,

October 16, 1944, and having compared said abstract with the original stenographic reports of their respective court reporters agree that it represents an accurate report of rulings by the court that day, on the several motions and petitions of the defendant and the motion of the plaintiff for judgment on the pleadings, together with pertinent comment thereon of the court and counsel.

William Parker Ward,
Attorney for Appellants,

J. Albert Woll,
United States Attorney,
Attorney for Appellee.

Entered Oct. 16, 1944

85 And on the same day, to wit, on the 16th day of October, A. D. 1944, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

86 In the District Court of the United States
Northern District of Illinois
Eastern Division

Monday, October 16, A.D. 1944.

Present: Honorable Michael L. Igoe,
District Judge

• • (Caption—No. 4670) • •

This cause this day coming on for hearing on the motion of the plaintiff for judgment on the pleadings and the motion of the defendants for leave to file certain motions come the parties by their attorneys and

It Is Ordered that the defendants be and they are hereby given leave to file instanter six (6) motions and two (2) petitions and that said motions and petitions be and they are hereby set for immediate hearing and the Court being fully advised in the premises

It Is Further Ordered that defendants' motion for leave to withdraw a petition heretofore filed herein on June 28,

1944 be and it is hereby granted and that defendants' motion for rule on plaintiff to file a reply to their answer to the supplemental complaint be and it is hereby overruled and

It Is Further Ordered that defendants' motion for rule on the plaintiff to file certain lists of auditors and accountants, etc. herein involved be and it is hereby overruled, that defendants' motion for a Bill of Particulars and defendants' motion to strike plaintiff's motion for judgment on the pleadings and the petition in support of said defendants' motion be and they are hereby overruled, that defendants' motion for a trial by Jury, together with the petition in support thereof be and they are hereby overruled and

It Is Further Ordered that the motion of the plaintiff for judgment on the pleadings be and it is hereby granted and that this cause be and it is hereby continued for the presentation by plaintiff of proposed findings of fact, conclusions of law and judgment order.

87 And afterwards, to wit, on the 20th day of October, A. D. 1944, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit: Entered Oct. 20, 1944

88 In the District Court of the United States
For the Northern District of Illinois
Eastern Division

(Caption—Civil Action No. 4670)

The court having examined the pleadings in this cause, heard argument on the plaintiff's motion for judgment on the pleadings and having found that there are no issues of fact properly before this court, that the Agricultural Marketing Agreement Act of 1927, pursuant to which this action is brought, provides an adequate method of resolving such issues of fact as the defendants have attempted to raise in their answer, that the defendants having failed to avail themselves of the administrative remedy provided by said Act, may not raise such issues of fact before this court, there is no justiciable issue of fact before this court

and having concluded that the defendants' pleadings present no defense at law to the allegations contained in the complaint, the court enters herewith its findings of fact, conclusions of law and order for judgment:

FINDINGS OF FACT

1. This proceeding is brought by the United States of America upon the request of the Secretary of Agriculture of the United States to enforce compliance with the Agricultural Marketing Agreement Act of 1937.

2. Order No. 41 and amendments thereto have been duly issued by the Secretary of Agriculture of the United States in accordance with and pursuant to the Agricultural Marketing Agreement Act of 1937.

89 3. The defendants, Joseph Ruzicka, Frank Ruzicka and Charles Ruzicka, are individuals doing business as Seeley Dairy, with their principal place of business at 4754 South Seeley Avenue, Chicago, Illinois.

4. The defendant, Frank Ruzicka, has been in the military service of the United States of America since April 1, 1942 and has taken no part in the management or conduct of the business known as Seeley Dairy since that date.

5. The co-partners and defendants, Joseph Ruzicka and Charles Ruzicka, have operated the business known as the Seeley Dairy, continuously since April 1, 1942.

6. All milk and cream in the Chicago, Illinois, Marketing Area, as defined in Order No. 41, is in the current of interstate commerce or tends to directly burden and obstruct interstate commerce in milk or its products.

7. The defendants, Joseph Ruzicka and Charles Ruzicka, co-partners, doing business as Seeley Dairy, receive milk from producers or other handlers and dispose of such milk in the Chicago, Illinois, Marketing Area.

8. Order No. 41, as amended, requires each handler to report its receipts and utilization of milk for each delivery period and to make full payment, on or before the 16th day after the end of each delivery period, to the fund maintained by the Market Administrator known as the producer-settlement fund, of the amounts shown on such reports to be due from the handler to such fund.

9. The defendants, Joseph Ruzicka and Charles Ruzicka, doing business as Seeley Dairy, are indebted to the Market Administrator for the producer-settlement fund on the basis of their own reports, for the delivery periods

April 1, 1942 to February 29, 1944, inclusive, in the sum of $961.27 which sum they have refused to pay.

90 10. Order No. 41, as amended, requires that the Market Administrator shall verify all reports and payments of each handler by an audit of such handler's records and the records of any other handler or person upon whose disposition of milk the handler claims classification, and that when such audit discloses errors in payments to the producer-settlement fund, the Market Administrator shall bill the handler for any unpaid amount and the handler is required to make payment to the Market Administrator within five days.

11. The defendants, Joseph Ruzicka and Charles Ruzicka, doing business as Seeley Dairy, are indebted to the Market Administrator for the adjustment of errors in payments made to the producer-settlement fund, as disclosed by audits of the books, records and reports for the delivery period April 1, 1942 to August 31, 1943, inclusive, in the sum of $2,119.17 which sum they have refused to pay.

12. Order No. 41 requires that each handler shall pay to the Market Administrator on or before the 18th day after the end of each delivery period, a sum not exceeding 2 cents per hundredweight with respect to all milk purchased or received by him during such delivery period, the exact sum to be determined by the Market Administrator subject to review by the Secretary. The Market Administrator determined that beginning with January 1, 1942 the exact sum should be 1½ cents per hundredweight.

13. The defendants, Joseph Ruzicka and Charles Ruzicka, doing business as Seeley Dairy, have failed to pay their pro-rata share of the expense of administration of Order No. 41, as amended, and are indebted to the Market Administrator for the administration expense fund, for the delivery periods April 1, 1942 to February 29, 1944, in the sum of $100.17 which sum they have refused to pay.

14. Order No. 41, as amended, requires that in making payments to producers, each handler with respect to all milk received from each producer during each delivery

91 period, shall deduct 3 cents per hundredweight or such lesser amount as the Market Administrator shall determine to be sufficient, such determination to be subject to review by the Secretary of Agriculture and shall on or before the 18th day after the end of such delivery period, pay such deductions to the Market Administrator,

such monies to be expended by the Market Administrator for marketing services to such producers. The Market Administrator determined that commencing January 1, 1942 the exact sum to be deducted and remitted for such services should be 2 cents per hundredweight.

15. The defendants, Joseph Ruzicka and Charles Ruzicka, doing business as Seeley Dairy, have failed to pay to the Market Administrator for the marketing service fund such sums as they are required to deduct from payments to producers for marketing services and are indebted to the Market Administrator for the marketing service fund for the delivery periods August 1, 1943 to September 29, 1944, in the sum of $172.22.

16. The supplemental complaint prays that said defendants be required to make all payments found to be due and owing to the Market Administrator on the date of entry of judgment herein.

Conclusion of Law

1. The defendants' business of handling milk in the Chicago, Illinois, Marketing Area constitutes such defendants "handlers" as defined in Section 8(c) (1) of the Agricultural Marketing Agreement Act of 1937, and as defined in Order No. 41, as amended, and as handlers they are subject to the provisions of Order No. 41, as amended.

2. The defendants by their failure and refusal to pay the amounts shown to be due the producer-settlement fund established by the Market Administrator in accordance with the provisions of Order No. 41, as amended, by their failure to pay their pro-rata share of the cost of administering said Order, and by their failure to pay to the Market Administrator for marketing services, the amounts required by said Order to be deducted from payments to the defendants' producers, have violated the provisions of Order No. 41, as amended, and have continued to violate said Order since the complaint herein was filed.

92

3. The plaintiff is entitled to a mandatory injunction commanding the defendants, Joseph Ruzicka and Charles Ruzicka, to comply fully with Order No. 41, as amended, and particularly commanding said defendants to pay to the Market Administrator such sums as are set forth in the complaint and to pay such additional sums as have become due and owing to the Market Administrator from said defendants for delivery periods occurring between the

close of the last delivery period included in the complaint and the date of entry of judgment herein.

4. A permanent injunction should issue restraining the defendants, Joseph Ruzicka and Charles Ruzicka, doing business as Seeley Dairy, their agents, attorneys, employees, and assigns from handling milk in violation of Order No. 41, as amended.

ORDER FOR JUDGMENT

1. It is ordered that a mandatory injunction issue commanding the defendants, Joseph Ruzicka and Charles Ruzicka, doing business as Seeley Dairy, their agents, attorneys, employees and assigns to comply full with Order No. 41, as originally issued and as subsequently amended, regulating the handling of milk in the Chicago, Illinois, Marketing Area.

2. It is ordered that a permanent injunction should issue enjoining and restraining the defendants, Joseph Ruzicka and Charles Ruzicka, doing business as Seeley Dairy, their agents, attorneys, employees, successors and assigns from handling milk in the Chicago, Illinois, Marketing Area in violation of any of the provisions of Order No. 41, as amended.

Michael L. Igoe,
United States District Judge

93 And on the same day, to wit, on the 20th day of October, A. D. 1944, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

Entered Oct. 20, 1944

94 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—Civil Action No. 4670) * *

FINAL JUDGMENT.

This cause having come on for hearing upon the plaintiff's motion for judgment on the pleadings, the court having examined the pleadings and heard the arguments of

counsel for the respective parties, having considered the case and filed its findings of fact and conclusions of law, It Is Ordered, Adjudged And Decreed:

1. That there is now owing by the defendants, Joseph Ruzicka and Charles Ruzicka, doing business as Seeley Dairy, hereinafter referred to as the defendants, to the Market Administrator of Order No. 41, as amended; for the producer-settlement fund on the basis of the defendants' filed reports for the delivery periods April 1, 1942 to and including February 29, 1944, the sum of $961.27; for the adjustment of errors in payments made to the producer-settlement fund, for the delivery periods from April 1, 1942 to and including August 31, 1943, the sum of $2,119.17; for the administration expenses, for the delivery periods from August 1, 1943 to and including February 29, 1944, the sum of $100.17; and for amounts required to be deducted from payments to producers and paid to the Market Administrator for marketing services, for the delivery periods from August 1, 1943 to February 29, 1944, the sum of $172.22.

2. That the defendants, their agents, attorneys, employees and assigns be and hereby are mandatorily enjoined and commanded to comply fully with Order No. 41, as amended, regulating the handling of milk in
95 the Chicago, Illinois, Marketing Area and the defendants and their assigns are commanded particularly,

(a) To pay to the Market Administrator, within fifteen days of the entry of judgment herein, the sum of $961.27 due and owing by the defendants to the Market Administrator for the producer-settlement fund, on the basis of the defendants' filed reports for the delivery periods from April 1, 1942 to and including February 29, 1944.

(b) To pay to the Market Administrator within fifteen days of the entry of judgment herein, the sum of $2,119.17 due and owing by the defendants to the Market Administrator for the adjustment of errors in payments made to the producer-settlement fund, for the delivery periods from April 1, 1942 to and including August 31, 1943.

(c) To pay to the Market Administrator within fifteen days of the entry of judgment herein, the sum of $100.17 now due and owing to the Market Administrator for administration expenses for the delivery

periods from August 1, 1943 to and including February 29, 1944.

(d) To pay to the Market Administrator within fifteen days of the entry of judgment herein, the sum of $172.22 now due and owing to the Market Administrator for marketing services for the delivery periods from August 1, 1943 to and including February 29, 1944.

(e) To pay to the Market Administrator within fifteen days of the entry of judgment herein, such additional amounts as are found to be due from the defendants to the Market Administrator as revealed by reports filed by said defendants for delivery periods occurring between the last delivery period set forth
96 in the complaint and the date of entry of judgment herein, and audits of the defendants' books and records performed by the Market Administrator subsequent to the filing of the supplemental complaint herein.

3. That a permanent injunction should issue enjoining and restraining the defendants, their agents, attorneys, employees, successors and assigns from handling milk in the Chicago, Illinois, Marketing Area in violation of any of the provisions of Order No. 41, as amended.

4. That jurisdiction over this cause be retained for the purpose of entering such further orders and judgment as may be necessary to afford full relief to the parties.

5. That judgment be entered against the defendants for the costs of this action to be taxed by the Clerk of the Court.

Michael L. Igoe
United States District Judge

Filed Nov. 17, 1944

97 And afterwards on, towit, the 17th day of November, 1944, came the Defts. Joseph Ruzicka, *et al.* by their attorney and filed in the Clerk's office of said Court a certain Notice of Appeal in words and figures following, to wit:

(Certificate of Mailing by Clerk Attached thereto)

98 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

United States of America, *Plaintiff*, *vs.* Joseph Ruzicka, Frank Ruzicka and Charles Ruzicka, individually and as co-partners, doing business under the trade name of Seeley Dairy, *Defendants.*	Civil Action No. 4670

NOTICE OF APPEAL.

Notice is hereby given that Joseph Ruzicka and Charles Ruzicka, defendants, above named, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the orders of the Court entered on the 16th day of October, 1944 denying certain motions of the defendants and sustaining plaintiff's motion for judgment on the pleadings and from final judgment entered in this cause on the 20th day of October, 1944.

William Parker Ward
Attorney for Joseph Ruzicka and Charles Ruzicka
William Parker Ward
10 So. LaSalle Street
Chicago 3, Illinois

Dated this 17th day of November, 1944.

(Certificate of Mailing by Clerk attached hereto)

99 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 20th day of November, 1944, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Mr. J. Albert Woll, United States Attorney,
450 U. S. Court House,
Chicago 4, Illinois.

Roy H. Johnson
(Seal) Roy H. Johnson, *Clerk.*

100 And afterwards on, to wit, the 27th day of December, 1944 came the Defendants-Appellants by their attorneys and filed in the Clerk's office of said Court certain Statement of Points in words and figures following, to wit: Filed Dec. 27, 1944

101 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 4670) * *

STATEMENT OF POINTS.

The points upon which appellants intend to rely on this appeal are as follows:

1. The Court erred in denying appellants' motion for a rule on the appellee to file its answer to the affirmative defenses pleaded in appellants' answer and answer to the supplemental complaint.
2. The Court erred in denying appellants' pre-trial motion for a list of appellee's auditors, accountants and testors.

3. The Court erred in denying appellants' pre-trial motion for a bill of particulars as to the amount of monies and as to butter fat tests involved.
4. The Court erred in denying appellants' motion to strike appellee's motion for judgment on the pleadings.
5. The Court erred in denying appellants' motion to set this cause for trial by jury as to the issue of the amount of monies involved.
6. The Court erred in sustaining appellee's motion for judgment on the pleadings.
7. The Court erred in not granting a trial of all material issues of fact arising from the pleadings.
8. The Court erred in not requiring the appellee to prove all material allegations of its complaint
102 which were denied by the answer of the appellants.
9. The Court erred in not requiring appellee to furnish evidence by testimony or exhibit in support of its complaints as to allegations denied by the appellants.
10. The Court erred in not affording appellants a trial at which evidence of the appellee's could be met and evidence of the appellants' defenses could be produced.

William Parker Ward
William Parker Ward,
Attorney for Appellants, Joseph Ruzicka and Charles Ruzicka.

Filed Dec. 27, 1944

103 And on the same day, to wit, the 27th day of December, 1944, came the Parties-Appellants and Appellee by their attorneys and filed in the Clerk's office of said Court a certain Stipulation in words and figures following, to wit:

104 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—Civil Action No. 4670)

STIPULATION.

It is hereby stipulated by and between the plaintiff and the defendants, Joseph Ruzicka and Charles Ruzicka,

acting through their respective attorneys that the time in which the appellee may file its counter-designation of record on appeal be and the same hereby is extended to and including the 11th day of January, 1945.

It is further stipulated that the time for docketing this cause on appeal in the Circuit Court of Appeals for the Seventh Circuit and the same hereby is extended to and including the 22nd day of January, 1945.

J. Albert Woll
J. Albert Woll,
Attorney for Appellee

William Parker Ward
William Parker Ward,
Attorney for Appellants, Joseph Ruzicka and Charles Ruzicka.

105 And on the same day, to wit, on the 27th day of December, A.D. 1944, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit: Entered Dec. 27, 1944

106 IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

Wednesday, December 27, A.D. 1944.

Present: Honorable Michael L. Igoe, District Court.

* * (Caption—No. 4670) * *

On stipulation of the parties by their attorneys filed herein, It Is Ordered that the time of the defendants within which to docket their Record on Appeal be and it is hereby extended to January 22, 1945 and that the time within which to file counter-designation be and it is hereby extended to January 11, 1945.

Filed Jan. 11, 1945

107 And afterwards on, to wit, the 11th day of January, 1945 came the Appellants and Appellee by their attorneys and filed in the Clerk's office of said Court a certain Stipulation in words and figures following, to wit:

108 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—Civil Action No. 4670) * *

STIPULATION.

It is hereby stipulated by and between the United States of America, plaintiff, and the defendants, Joseph Ruzicka and Charles Ruzicka, acting through their respective attorneys that the time within which the United States of America, appellee, may file its counter-designation of record on appeal be and the same hereby is extended to and including the 21st day of January, 1945.

It is further stipulated that the time for docketing this cause on appeal in the Circuit Court of Appeals for the Seventh Circuit be and the same hereby is extended to and including the 31st day of January, 1945.

J. Albert Woll
J. Albert Woll
Attorney for Appellee

William Parker Ward
William Parker Ward
Attorney for Appellants, Joseph Ruzicka and Charles Ruzicka.

109 And on the same day, to wit, on the 11th day of January, A.D. 1945, being one of the days of the regular December, 1944, term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit: Entered Jan. 11, 1945

110 IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

Thursday, January 11, A.D. 1945

Present: Honorable Michael L. Igoe, District Judge.

* * (Caption—No. 4670) * *

On stipulation of the parties by their attorneys filed herein, It Is Ordered that the time within which the Appellee may file counter-designation of record on appeal be and it is hereby extended to January 21, 1945 and the time within which to docket record on appeal be and it is hereby extended to January 31, 1945.

111 And on the same day, to wit, the 27th day of December, 1944, came the Defendants-Appellants by their attorney and filed in the Clerk's office of said Court a certain Designation in words and figures following, to wit: Filed Dec. 27, 1944

112 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 4670) * *

DESIGNATION OF RECORD.

Appellants designate the following portions of the record and proceedings to be contained in the record on appeal in this action:

1. Complaint.
2. Answer of Joseph Ruzicka and Charles Ruzicka.
3. Supplemental Complaint.

4. Answer of Joseph Ruzicka and Charles Ruzicka to Supplemental Complaint.

5. Motion for judgment on the pleadings by plaintiff.

6. Motion of defendants, Joseph Ruzicka and Charles Ruzicka for a rule on the plaintiff to file a reply to their answer to the Supplemental Complaint.

7. Motion of defendants, Joseph Ruzicka and Charles Ruzicka for a rule on the plaintiff to file a list of the names and addresses of the auditors, accountants, testors, etc., involved herein.

8. Motion of the defendants Joseph Ruzicka and Charles Ruzicka for a bill of particulars as to the amount of monies allegedly due and as to the butter fat content tests herein involved.

113 9. Motion of defendants, Joseph Ruzicka and Charles Ruzicka to strike the motion for judgment on the pleadings filed by the plaintiff.

10. Petition by the defendants, Joseph Ruzicka and Charles Ruzicka, in support of their motion to strike the motion of the plaintiff for judgment on the pleadings.

11. Motion of the defendants, Joseph Ruzicka and Charles Ruzicka to set the cause for jury trial as to the issues of fact concerning the payment of monies allegedly due.

12. Petition of the defendants, Joseph Ruzicka and Charles Ruzicka, in support of their motion to set the cause for jury trial as to the issues of fact concerning the payment of monies.

13. Minute order of the Court entered the 16th day of October denying;

a. Defendants' motion for a rule on the plaintiff to file a reply to their answer to the Supplemental Complaint.

b. Defendants' motion for a rule on the plaintiff to file certain lists of auditors and accounts, etc., herein involved.

c. Defendants' motion for a bill of particulars.

d. Defendants' motion and petition in support thereof to strike plaintiff's motion for judgment on the pleadings.

e. Defendants' motion and petition in support thereof to set the cause for trial by jury as to the amount of monies allegedly due;

and sustaining plaintiff's motion for judgment on the pleadings.

114 14. Findings of fact, conclusion of law and order for judgment entered the 20th day of October, 1944.

15. Order of final judgment entered the 20th day of October, 1944.

16. Notice of appeal filed by Joseph Ruzicka and Charles Ruzicka, defendants, to the United States Circuit Court of Appeals for the Seventh Circuit filed the 17th day of November, 1944.

17. Statements of points on which appellants intend to rely.

18. Stipulation of attorney for appellants and attorney for appellee for enlargement of time for counter designation of record by appellee and for docketing in the Circuit Court of Appeals on appeal.

19. Minute order of Court of the 27th day of December, 1944 enlarging the time for appellee's counter designation of record and for docketing on appeal.

20. This designation.

William Parker Ward,
William Parker Ward, *Attorney for Appellants, Joseph Ruzicka and Charles Ruzicka.*

115 And afterwards on, to wit, the 22nd day of January, 1945 came the Plaintiff-Appellee by its attorneys and filed in the Clerk's office of said Court a certain Designation of Record in words and figures following, to wit: Filed Jan. 22, 1945

116 In the District Court of the United States
For the Northern District of Illinois
Eastern Division

(Caption—Civil Action No. 4670)

DESIGNATION OF RECORD.

The appellee designates the following portions of the record of proceedings in the District Court of the United States for the Northern District of Illinois, Eastern Division, to be contained in the record on appeal in this action:

1. Petition of defendants Joseph Ruzicka and Charles Ruzicka, filed June 28, 1944, requesting a stay of proceedings before the District Court of the United States until final determination of their petition to the Secretary of Agriculture for an administrative hearing.

2. Motion of the defendants Joseph Ruzicka and Charles Ruzicka for leave to withdraw their petition, filed June 28, 1944, asking a stay of proceedings pending final determination of their petition to the Secretary of Agriculture for an administrative hearing.

3. Minute order of the court entered October 16, 1944, allowing defendants' motion for leave to withdraw petition for stay of proceedings, filed on June 28, 1944.

4. Portions of the report of proceedings in the above-entitled action, held before Judge Michael L. Igoe in the District Court of the United States, October 16, 1944, as shown on the abstract of said proceedings here annexed.

5. Stipulation between attorney for appellants and attorney for appellee for further enlargement of time for filing counter-designation of record by appellee and extension of time for docketing in the Circuit Court of Appeals.

6. Minute order of court entered January 11, 1945, enlarging the time for appellants' counter-designation of record and extending time for docketing on appeal.

7. This designation.

J. Albert Woll,
J. Albert Woll, *United States Attorney*
Attorney for Appellee.

117 Northern District of Illinois } ss:
Eastern Division }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record, and made in accordance with Designations filed by Defendants-Appellants and Plaintiff-Appellee in cause entitled: *United States of America* v. *Joseph Ruzicka, Frank Ruzicka and Charles Ruzicka,* individually and as co-partners, doing business under the trade name of Seeley Dairy, No.

4670, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District this 29th day of January, A.D. 1945.

Roy H. Johnson,
Clerk.

(SEAL)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, filed March 9, 1945, in: Cause No. 8759, THE UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOSEPH RUZICKA AND CHARLES RUZICKA, Defendants-Appellants, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-eighth day of January A. D. 1946.

[SEAL] (S) KENNETH J. CARRICK,

Clerk of the United States Circuit Court, of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the third day of October, in the year of our Lord one thousand nine hundred forty-four, and of our Independence, the one hundred and sixty-ninth.

8759

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

JOSEPH RUZICKA AND CHARLES RUZICKA, DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

And, to-wit: On the thirtieth day of October 1945, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said opinion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit

No. 8759

October Term and Session, 1945

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPH RUZICKA AND CHARLES RUZICKA, DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

October 30, 1945

Before EVANS, SPARKS, and KERNER, Circuit Judges.

EVANS, Circuit Judge. Defendants, by this appeal, assail the validity of a decree entered in this suit, which was brought to collect payment of sums allegedly due the Market Administrator under the Agricultural Adjustment Act (7 U. S. C. A. Sec. 601) and to enjoin defendants from violating an order of the Secretary of Agriculture known as Order No. 41. The decree was entered upon the pleadings. The attack is directed to the court's failure to permit defendants to present evidence which would show error in the Market Administrator's "verification" of defendants' reports.

Defendants are co-partners operating a dairy business in Chicago. The Market Administrator, checking the reports of these defendants, claims to have discovered errors which resulted in a finding by him of indebtedness of substantial sums which the defendants owed the Administrator's "producers-settlement milk fund." Defendants in their answer denied the existence of such errors and also denied that any sum was by them owing the Milk Fund established by the Market Administrator. They assert the verification was erroneous, improper, incomplete, and inaccurate.

Order No. 41, the order involved, is a comprehensive one made by the Secretary of Agriculture pursuant to the Agricultural Adjustment Act (7 U. S. C. A. Sec. 601 *et seq.*). It "regulates the handling of milk in the Chicago, Illinois marketing area." Among its provisions is one which calls for the payment, by the handler, of sums based upon the amount and quality of milk "produced or received" by him within seventy miles of the Chicago City Hall.

This order also creates an official called a Market Administrator, who, with employees whom he selects, administers the order.

Among other duties, said Market Administrator "shall verify all reports and payments of each handler, by an audit of such handler's records." "Each handler shall keep adequate records of receipts of milk and shall * * * make available to the Market Administrator * * * such records * * *" as will enable the Market Administrator to perform his duties and particularly to verify the receipts and disposition of the milk by him handled and verify payments to producers and weigh samples and test the butter fat content of the milk so handled in the Chicago area.

The Market Administrator "may maintain a suit in his own name against any handler for collection of such handler's pro rata share of expense * * *." The Market Administrator is required to establish and maintain a separate fund known as the "Producers Settlement Fund" into which he shall deposit all payments made by handlers and out of which he shall make all payments to handlers pursuant to Paragraphs (f) and (g) of this section. It also provides that the Market Administrator shall offset any such payment due to any such handler against payment due from such handler.

Important is the provision governing verification of reports and payments. "The Market Administrator shall verify all reports and payments of each handler by audit of such handler's records, and of the record of any other handler or person upon whose disposition of milk such handler claims classification * * *." Most significant is the provision of the statute which permits the handler to appeal to the Secretary of Agriculture for a modification of the Administrator's decision as to the amount due from or to the handler.

Determination of the instant appeal turns upon the correctness of the District Court's ruling that defendants were limited in their redress efforts to an appeal to the Secretary of Agriculture. In other words, the court held that no relief through appeal to the courts to secure a correction of the Market Administrator's verification of the handler's report was permitted.

Defendants did not pursue their right to seek a review of the Administrator's order by the Secretary of Agriculture, under Sec. 608c15, prior to the commencement of this action. Defendants did file such petitions with the Secretary of Agriculture, October 28, 1943, and April 29, 1944, after the commencement of this action. No hearing was had at the time defendants petitioned the trial court on June 28, 1944, for a stay of the instant proceeding pending such administrative determination.

Since the determination of this appeal turns upon the construction to be given the controlling statute, we quote it at length:

"Sec. 608a (6). The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts."

"Sec. 608a (8) The remedies provided for in this section shall be in addition to, and not exclusive of any of the remedies or penalties provided for elsewhere in this chapter or now or hereafter existing at law or in equity."

"Sec. 608c (15)

"(A) Any handler subject to any order *may* file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with the regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law."

"(B) The District Courts of the United States * * * in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. * * * If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608 (a) (6) of this title. Any proceedings brought pursuant to section 608a (6) of this title * * * shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

Our problem presents the difficult question of the interpretation of a statute and the ascertainment of Congressional intent. Did Congress intend, when it inserted Sec. 608 in this act, to grant an exclusive relief and bar all other remedies?

The provisions of the statute contemplate (1) a remedy by the Government, in the district court, to enforce an order and to restrain violation of an order (Sec. 608a (6); (2) the right of the Government to institute enforcement proceedings is made not exclusive of other statutory or existing legal or equitable remedies (Sec. 608a (8)); (3) a handler feeling aggrieved by an order may seek review thereof with the Secretary of Agriculture, who shall give a hearing and his ruling is "final, if in accordance with law," and review is provided of his order by the District Court, in a suit in equity. If the Court finds the Secretary's decision is not in "accordance with law" it remands the proceeding with instructions; (4) a proceeding to enforce may be instituted by the Government, notwithstanding the pendency of an administrative proceeding under subsection (15), instituted by the handler, but the proceeding to enforce is to abate if a prior final decree is rendered in the proceedings growing out of the administrative proceeding.

It is argued in favor of an interpretation of the statute making the administrative proceeding the sole remedy to settle factual disputes: (1) The specific statutory set up is provided for the speedy and expert solution of those technical matters of administration of a specialized agricultural problem, and it must be inferred therefrom that it was intended that the administrative agency thus provided was to be exclusive. (2) Subsection 15 states the ruling of the Secretary "shall be final" subject to the review on questions of law therein provided. (3) The only limitation on the finality of his decree is that it must be in "accordance with law;" thereby eliminating review on issues of fact. Such limitation means determination in accordance with procedure provided by law and compliance with the substantive statutory law. It indicates there is not to be a review of fact issues.

On the other hand, (1) it is clear that by Subsection 608a (8) Congress did not intend to wipe out any existing equitable or legal remedy (at least in favor of the Government) despite the fact it provided specifically for enforcement proceedings. This saving clause of existing remedies tends to substantiate the belief that Congress did not mean to make the special statutory remedies the only ones. (2) The statute provides that the handler "may" utilize the administrative remedy of review. Emphasis is on the word "may." It is argued, however, that the word "shall" could not have been used, otherwise the handler even though satisfied, would be forced to seek a review. (3) The statute recognizes the possibility of concurrency of remedies. The judicial one is not precluded by the administrative, except that it was to abate upon the prior final decree in the latter proceedings.

We confess to real doubt as to the true intent of Congress, but by virtue of that very doubt we conclude the aggrieved handler

should not be deprived of the right to a trial on the fact issue where an alleged erroneous imposition of bills for sums due is involved.

We reach our conclusion for several reasons. Had Congress meant to make subsection (15), the administrative review, the sole and exclusive remedy, it could easily have said so, and in the absence of such an express limitation we should not read it into the statute. Our system of jurisprudence stresses fairness and completeness of hearing of factual issues to all litigants. In this instance the Government is both the asserter and trier of facts. The handler is entitled to his day in court, even though he did not himself resort to another, affirmative, remedy which was at his disposal. He might have been limited to a hearing by the official who is investigator, charger, and trier-of-fact. It was within the power of Congress to so legislate. But unless Congress has clearly denied access to judicial review of fact findings of the market administrator, we hold the court should be and is open to him.

Our search for precedent* for guidance has not been entirely convincing or satisfactory. We find a bit of light in the statement of the Supreme Court in *Stark* v. *Wickard*, 321 U. S. 288, 308:

> "The Act bears on its face the intent to submit many questions arising under its administration to judicial review. Secs. 8a (6), 8c (15) (A) (B). It specifically states that the remedies specifically provided in Sec. 8a are to be in addition to any remedies now existing at law or equity. Sec. 8a (8). This Court has heretofore construed the Act to grant handlers judicial relief in addition to the statutory review specifically provided by Sec. 8c (15). On complaint by the United States, the handler was permitted by way of defense to raise issues of a want of statutory authority to impose provisions on handlers which directly affect such handlers. United States v. Rock Island Co-op., 307 U. S. 533, 560-61. In the Rock Royal case the Government had contended that the handlers had no legal standing in the suit for enforcement to attack provisions of the order relating to handlers. While we upheld the contention of the Government as to the lack of standing of handlers to object to the operating of the producer settlement fund on the ground that the handlers had no 'financial interest' in that fund, we recognized the standing of a proprietary handler to question the alleged discrimination shown in favor of the co-operative handlers."

*There have been decided in the year 1945 two cases involving appeal from a District Court review of the Secretary of Agriculture's determination under subsection (15).

The Court continues:

"With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue * * * Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. * * * The terms of the Order are largely matters of administrative discretion as to which there is no justiciable right or are clearly authorized by a valid act. * * * Technical details of the milk business are left to the Secretary and his aides."

It may well be argued that this latter quotation negatives somewhat the support given by the previous quotation.

In United States v. Rock Royal Co-op., 307 U. S. 533, 560–61, the Court said:

"Although three of the defendants cannot complain of the benefits conferred upon cooperatives, for they are cooperatives, the defendant Jetter Dairy Company has standing to raise the issue of want of statutory authority to except cooperative handlers from the payment of the uniform price. It is a proprietary corporation, a handler of milk, required by the Order to pay uniform prices for the milk it purchases. * * * The cooperatives are excepted from the payment. The burden of payment is laid directly upon Jetter while others are excepted. * * *"

The case of Yakus v. U. S., 321 U. S. 414, gives us reason to pause, for in that case a defendant in a criminal case was denied leave to raise a defense of illegality of regulation, the violation of which was the basis of the criminal violation. The denial of leave to raise this defense was on the ground administrative remedies had not been exhausted. But in that case, involving the Emergency Price Control Act, the administrative remedy was by stat-

ute expressly made the exclusive remedy. The same was true of the Selective Service Act, Falbo v. United States, 320 U. S. 549.

The same is true in the case of Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, where the Court held the District Court had no jurisdiction to enjoin the National Labor Relations Board from a hearing on unfair labor practices because the Labor Act provided that the hearing before the Board and review by the Court of Appeals was the exclusive remedy under the statute.

The most pertinent authority is the decision of the Ninth Circuit in La Verne Co-op. Citrus Assn. v. U. S., 143 F. 2d 415, which was a suit for injunction, instituted by the United States to enjoin defendants from handling lemons in violation of a certain order under the Agricultural Adjustment Act. The District Court refused to admit any of the offered evidence on the issue of unconstitutionality of the orders, on the ground that the Act provides for an exclusive administrative remedy which was pending. The Court of Appeals affirmed the decision. In this case the defendants admitted they had shipped an excessive quantity of lemons.

After due consideration we reach a contrary conclusion to that announced in the La Verne case.

The judgment is reversed with directions to proceed in accordance with the views herein expressed.

KERNER, Circuit Judge, dissenting. The law is now firmly settled that where a right of review is conferred by a statute the aggrieved party or litigant must invoke and exhaust the administrative remedy provided by the statute before he may resort to the courts. Anniston Mfg. Co. v. Davis, 301 U. S. 337; Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41; and Yakus v. United States, 321 U. S. 414.

Section 8c (15) (A) of the Act provides a method or machinery for review whereby any handler subject to an order may file a petition with the Secretary of Agriculture stating that any obligation imposed in connection with an order is not in accordance with law; and pray for a modification thereof.

As I interpret this section of the Act, it prescribes an exclusive procedure for the determination of such issues; consequently, if the Market Administrator erred as to the defendants' obligations under the milk order to the producer-settlement, administrative expense and marketing service funds, then it was "an obligation imposed not in accordance with law" within the terms of the statute, and defendants are put to their statutory remedy. I believe that Congress intended the Secretary of Agriculture and not the courts to determine what sum, if any, is owing by a handler to the Milk Fund established by the Market Administrator, and pro-

vision was made for a review of the Secretary's action. See § 8c (15) (B).

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And on the same day, to wit: On the thirtieth day of October, 1945, the following further proceedings were had and entered of record, to wit:

TUESDAY, OCTOBER 30, 1945.

Court met pursuant to adjournment.

Before: Hon. EVAN A. EVANS, Circuit Judge, Hon. WILLIAM M. SPARKS, Circuit Judge, Hon OTTO KERNER, Circuit Judge.

8758

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPH RUZICKA AND CHARLES RUZICKA, DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court with directions to proceed in accordance with the views expressed in the opinion of this Court filed this day.

And afterwards, to wit: On the ninth day of January 1946, the following further proceedings were had and entered of record, to wit:

WEDNESDAY, JANUARY 9, 1946.

Court met pursuant to adjournment.

Before: Hon. EVAN A. EVANS, Circuit Judge.

8759

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPH RUZICKA AND CHARLES RUZICKA, DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

On motion of counsel for appellee, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed pursuant to Rule 25 of the Rules of this Court.

United States Circuit Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the Opinion, filed October 30, 1945, the Judgment, entered on the same day and the Order staying issuance of Mandate, entered January 9, 1946, in: Cause No. 8759, The United States of America, Plaintiff-Appellee vs. Joseph Ruzicka and Charles Ruzicka, Defendants-Appellants, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-eighth day of January A. D. 1946.

(S) KENNETH J. CARRICK,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1946

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

8759

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPH RUZICKA AND CHARLES RUZICKA, DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

And, to wit: On the thirteenth day of November 1945, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said petition for rehearing is not copied herein.

And afterwards, to wit: On the twenty-third day of November 1945, there was filed in the office of the Clerk of this Court, an Answer to Petition for Rehearing, which said answer to petition for rehearing is not copied herein.

And afterwards, to wit: On the fifth day of January 1946, the following further proceedings were had and entered of record, to wit:

Saturday, January 5, 1946

Court met pursuant to adjournment.

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. OTTO KERNER, Circuit Judge.

8759

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPH RUZICKA AND CHARLES RUZICKA, DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

It is ordered by the Court that the Petition for a Rehearing of this cause be, and it is hereby, denied.

United States Circuit Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten page contains a true copy of reference to petition for rehearing, filed November 13, 1945, reference to answer

to petition for rehearing, filed November 23, 1945, and order denying petition for rehearing, entered January 5, 1946, in Cause No. 8759, The United States of America, Plaintiff-Appellee vs. Joseph Ruzicka and Charles Ruzicka, Defendants-Appellants, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-fifth day of February A. D. 1946.

[SEAL]

(S.) KENNETH J. CARRICK,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Supreme Court of the United States

Order allowing certiorari

Filed April 22, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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CHARLES ELMORE CROPLEY
CLERK

No. 920 54

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH RUZICKA AND CHARLES RUZICKA, INDIVIDUALLY, AND AS CO-PARTNERS, TRADING AS SEELEY DAIRY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 920

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH RUZICKA AND CHARLES RUZICKA, INDIVIDUALLY, AND AS CO-PARTNERS, TRADING AS SEELEY DAIRY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled cause on October 30, 1945, reversing a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, granting an injunction directing compliance with, and permanently enjoining violations of, the provisions of Order No. 41, as amended, issued under the Agricultural Marketing Agreement Act of 1937, as amended, regulating the handling of milk in the Chicago, Illinois, Marketing Area (R. 121–123).

OPINION BELOW

No opinion was rendered by the District Court. The findings of fact and conclusions of law entered by the District Court appear in the record (R. 117–121). The opinion of the Circuit Court of Appeals (R. 135–141) is reported in 152 F. 2d 167.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 30, 1945, and a petition for rehearing was denied on January 5, 1946 (R. 144). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

QUESTION PRESENTED

Whether, in a proceeding under Section 8a (6) of the Agriculture Marketing Agreement Act of 1937 to enforce compliance with obligations imposed upon the defendants by a milk marketing order issued under Section 8c of the Act, the defendants, after having admitted non-compliance with the order, may challenge the legality of the obligations which it imposes before the administrative remedy specifically provided by Section 8c (15) for determining the legality of the order has been exhausted.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7

U. S. C. sec. 601, *et seq.*, which reenacted and amended the Agricultural Adjustment Act as amended (48 Stat. 31, 48 Stat. 670, 49 Stat. 750). The pertinent provisions are as follows:

> 8a (6). The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.
>
> 8a (8). The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.
>
> 8c (15) (A). Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connecton therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

8c (15) (B). The District Courts of the United States (including the district court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

The administrative regulation involved is Milk Order No. 41, as amended, issued under the act by the Secretary of Agriculture on June 27, 1941 (6 Fed. Reg. 3130) and set forth in full in the record (R. 43–65). The order fixes a use value uniform as to all handlers for each of four classes of milk (sec. 941.4 941.5, R. 49–58). Each handler is required to report to the market administrator the quantity of milk used in each class (sec. 941.3 (a), R. 48–49). The market administrator adds the reported use values of the milk of all the handlers, the location differentials, the cash balance in the producer-settlement fund, divides the resulting total by the quantity of milk reported handled, subtracts a reserve for errors in reports and payments, and announces the balance as the uniform price to be paid by handlers to producers (sec. 941.2 (e), R. 48; sec. 941.7, R. 59–60). Since the variance among handlers in the percentage of milk used in a given class will normally mean that the use values for a handler may be greater or less than payments at the uniform price required to be made by him to his producers, handlers for whom there is a plus difference are required to pay the difference into a producer-settlement fund, while a handler for whom there is a minus difference is entitled to be paid the difference from the fund in accordance with a transcript of account furnished by the market administrator

(sec. 941.8, R. 60–62). These payments, including those due as a result of adjustments in errors in payments, are provided for in the following paragraphs:

941.8 (d) Producer-settlement fund. The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to paragraphs (e) and (g) and out of which he shall make all payments to handlers pursuant to paragraphs (f) and (g) of this section: Provided, That the market administrator shall offset any such payment due to any handler against payments due from such handler. Immediately after computing the uniform price for each delivery period, the market administrator shall compute the amount by which each handler's net pool obligation, including the payments to producers which are required to be made pursuant to Sec. 941.6, is greater or less than the sum obtained by multiplying such handler's net pooled milk by the uniform price and shall enter such amount on each handler's account as such handler's pool debit or pool credit, as the case may be, and render such handler a transcript of his account.

941.8 (e) Payments to the producer-settlement fund. On or before the 16th day after the end of each delivery period

each handler shall make full payment to the market administrator of any pool debit balance shown on the account rendered, pursuant to paragraph (d) of this section, for the preceding delivery period.

941.8 (f) Payments out of the producer-settlement fund. On or before the 17th day after the end of each delivery period, the market administrator shall pay to each handler the pool credit balance shown on the account rendered, pursuant to paragraph (d) of this section, if any, for the preceding delivery period, less any unpaid obligations of the handler. If at such time the balance in the producer-settlement fund is insufficient to make all payments pursuant to this paragraph, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available. No handler, who, on the 18th day after the end of each delivery period, has not received the balance of the payment due him from the market administrator shall be deemed to be in violation of paragraph (a) of this section if he reduces his total payments uniformly to all producers by not more than the amount of the reduction in payment from the producer-settlement fund.

941.8 (g) Adjustments of errors in payments. Whenever verification by the market administrator of reports or pay-

ments of any handler discloses errors made in payments to the producer-settlement fund pursuant to paragraph (d) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer, for milk purchased or received by such handler, discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

STATEMENT

On September 15, 1942, the United States, petitioner herein, filed its complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 3–7), in which it sought to compel the respondents to comply with Order No. 41, as amended. An answer was filed on November 13, 1942 (R. 70–

73). A supplemental complaint[1] was filed on April 10, 1944 (R. 73–78), and an answer to the supplemental complaint was filed on May 8, 1944 (R. 89–95).

The material allegations of the supplemental complaint are as follows: Respondents, handlers of milk, have filed reports with the market administrator from which the market administrator has made computations and rendered respondents monthly a transcript of their account with the producer-settlement fund, all as required by Order No. 41, as amended (R. 75). In violation of Section 941.8 (e) (R. 61) of the Order (which requires each handler on or before the 16th day after the end of each delivery period to make full payment to the market administrator of any debit balance "shown on the account rendered"), respondents failed and refused with respect to delivery periods from April 1, 1942, to and including February 29, 1944, to make full payment of the amounts shown to be due, with the result that as of March 16, 1944, respondents were indebted to the market administrator on the basis

[1] The original complaint also included Frank Ruzicka, a co-partner, as a defendant and sought recovery of money due for delivery periods prior to April 1, 1942. It later appeared that Frank Ruzicka had entered the military service on April 1, 1942, and, upon the request of respondents, the district court entered an order on June 25, 1943, withdrawing the case based upon the original complaint from the trial call of the court until the release of Frank Ruzicka from military service (R. 73–74). The supplemental complaint sets forth claims arising since April 1, 1942.

of their filed reports in the sum of $961.27 (R. 75). The supplemental complaint further alleges that, in accordance with the requirements of the order, the market administrator audited the reports and records of respondents, found deficiencies in payments to the producer-settlement fund for the delivery periods commencing April 1, 1942, and ending August 31, 1943, in the sum of $2,119.17, and billed respondents for this amount (R. 75–76). In violation of Section 941.8 (g) (R. 61–62) (which requires the handler to pay within 5 days "the amount so billed") respondents failed and refused to pay the billed amount (R. 76).[2]

Respondents answers did not deny the filing of the alleged reports with the market administrator, the receipt of the monthly transcript of their account with the producer settlement fund based upon the reports filed, the receipt of a bill for shortages disclosed by the audit of the market administrator, or the non-payment of the debit

[2] The supplemental complaint also alleged and the district court found that respondents were indebted to the market administrator for their pro rata share of the expenses of administration and for marketing services (R. 76, 119–120). Respondents' answer denied these claims (R. 92). However, after the decision of the Circuit Court of Appeals reversing the judgment of the district court, respondents paid the claimed amounts to the market administrator. Consequently, no further reference will be made to the amounts claimed for administrative expenses and marketing services.

balance shown on the account rendered or the bill for shortages disclosed by the audit (R. 70, 89, 91). However, respondents alleged that any billing by the market administrator, if properly made and applicable to respondents, was based upon an erroneous, improper, incomplete and inaccurate inspection or audit of respondents' reports, books and records and upon findings gathered from and based upon erroneous, improper, incomplete and inaccurate tests of respondents' milk and milk products (R. 91).

Respondents' answer also affirmatively alleged: (1) the invalidity of the issuance of the order because promulgated upon insufficient and inaccurate economic facts (R. 92–93); (2) the invalidity of the continued existence of the order because of its failure to effectuate the declared policy of Congress and its conflict with the declared policy of other acts and orders promulgated thereunder (R. 93–94); and (3) the absence of an affirmative determination by the Secretary of Agriculture of the applicability of the act and order involved to respondents (R. 94).

Respondents, after answering, petitioned the trial court to stay further proceedings until the final administrative determination of the matters in controversy between the petitioner and respondents in a proceeding under Section 8c (15) (A) of the Act then pending before the Secretary

of Agriculture.[3] The petition stated that the administrative proceedings would "afford a full and complete hearing as to the amount of monies, if any, due to the funds administered by the Market Administrator" (R. 95–97). Several months later petitioner moved for judgment on the pleadings (R. 98). At the hearing on this motion respondents requested and were granted leave to withdraw the petition to stay the proceedings (R. 108). At the same hearing respondents petitioned for rules on the petitioner (1) to file a reply to the affirmative defenses in the answer; (2) for a bill of particulars as to the amount of money claimed and the basis of the claim; (3) to strike the motion for judgment on the pleadings; and (4) to have the case set for a

[3] Respondents filed petitions under Section 8c (15) (A), for administrative relief both during the pendency of the action and after the entry of judgment in the district court. The first petition was filed November 2, 1943, and was superseded by a petition filed May 3, 1944, which in turn was superseded by an amended petition filed August 9, 1944. At the hearing on this petition respondents requested a continuance to await the outcome of the enforcement proceedings. The petition was dismissed on December 12 with leave to file another petition within 30 days (3 Agr. Dec. 1049). A new petition was filed on January 13, 1945. Motions filed by defendant in connection with this hearing were denied on May 18, 1945. At the hearing on this petition on May 29, 1945, respondents moved to continue the hearing to await the outcome of the present case and, upon denial of this motion, respondents' motion to withdraw the petition was granted without prejudice (4 Agr. Dec. 825).

hearing before a jury (R. 99–106). These motions were denied (R. 116–117).

The trial court granted petitioners' motion for judgment on the pleadings (R. 115). It held that the only issue was whether the respondents had failed to discharge their obligations under the order and this issue was decided in favor of the petitioner by the admissions in the answer (R. 117–118). The final judgment of the district court, entered October 20, 1944, required the respondents to pay to the market administrator the sums claimed in the supplemental complaint and such additional sums as are found to be due for subsequent delivery periods down to the date of the entry of judgment and also restrained respondents from further violations of the order. The court retained jurisdiction to await the outcome of the then pending administrative proceedings.

Respondents appealed to the Circuit Court of Appeals for the Seventh Circuit, which entered an order on October 30, 1945, reversing the judgment of the district court and remanding the case for further proceedings in accordance with the views expressed in the opinion (R. 142). The majority opinion held that the trial court erred in holding that respondents were not entitled to challenge the legality of the obligations imposed by the order in a compliance proceeding (R. 135–141). Judge Kerner, dissenting from

this holding, was of the opinion that Section 8c (15) provided the exclusive procedure for determining the legality of an obligation imposed under the order (R. 141). A petition for rehearing was filed on November 13, 1945, and was denied on January 5, 1946 (R. 144).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that in an enforcement action under Section 8a (6) of the Act, the district court could not, upon a showing of non-compliance, require the respondents to discharge their obligations under the Order pending exhaustion of their administrative remedy under Section 8c (15) of the Act for a modification of such obligations.

2. In holding that where the market administrator bills a handler for sums due based on filed reports, the handler is entitled to a trial on all fact issues in an enforcement action.

3. In holding that the district court was in error in refusing to permit the respondents to present evidence to show alleged error in the billings of the market administrator by reason of an inaccurate inspection or audit of respondents' records and findings based upon improper, incomplete, and inaccurate tests of respondents' milk and milk products.

4. In failing to hold that the administrative proceeding by a handler under Section 8c (15)

of the Act is the sole remedy to settle disputes with respect to the legality of obligations imposed on the handler under a milk order.

5. In failing to hold that Section 8a (6) of the Act, in the light of the mandate expressed in Section 8c (15) thereof, authorizes the district court to direct compliance by a handler pending a determination of factual issues by the Secretary of Agriculture in the administrative proceeding established by the Act.

6. In ruling that Section 8a (8) of the Act tends to substantiate a belief that Congress did not mean to make the administrative remedy exclusive.

7. In holding that the word "may" in Section 8c (15) of the Act indicates congressional intent that the administrative remedy is permissive rather than exclusive.

8. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below is in conflict with the only other decision of an appellate court on the question. In *La Verne Co-op. Citrus Ass'n* v. *United States*, 143 F. 2d 415, the Circuit Court of Appeals for the Ninth Circuit held that the constitutionality of a lemon limitation order, also issued pursuant to Section 8c of the Agricultural Marketing Agreement Act of 1937, which appears valid on its face, cannot be challenged

in an enforcement proceeding under Section 8a (6) when the administrative remedy provided by Section 8c (15) has not been exhausted. In reaching this conclusion, the court stated that the procedure provided by the latter section "for determining the validity of orders is exclusive" (p. 418). This decision is indistinguishable in principle from the present case, and the court below expressly stated (R. 141) that it had reached "a contrary conclusion to that announced in the *La Verne* case."[4] In cases arising under milk orders, the district courts have uniformly reached the same conclusion as that of the Ninth Circuit in the *La Verne* case with respect to suits to enforce the collection of monetary obligations due a market administrator. *United States* v. *Hogansburg Milk Co., Inc.*, 57 F. Supp. 297 (N. D. N. Y.); *United States* v. *Ridgeland Creamery Co.*, 47 F. Supp. 145 (W. D. Wis.); *United States* v. *Burlington Sanitary Milk Co., Inc.*, decided October 16, 1944 (E. D. Wis., unreported).

2. The Government submits that the decision of the court below misconstrues the purpose of Congress to make the administrative proceedings authorized by Section 8c (15) (A) the sole forum for determining the legality of obligations imposed by marketing orders issued under Section

[4] In the *La Verne* case an administrative proceeding brought by the defendant was still pending. In this case respondents had filed, but subsequently withdrawn, a petition for administrative relief. See p. 12, note 3, *supra*.

8c of the Act. The relevant statutory provisions are: The several district courts are given jurisdiction to enforce, and to restrain any person from violating, any order or regulation issued under the Act (Sec. 8a (6)). Any handler subject to an order issued under the Act is authorized to petition the Secretary of Agriculture to determine, after hearing, the legality of any such order, any provision of any such order, "or any obligation imposed in connection therewith". The determination of the Secretary shall be final if in accordance with law (Sec. 8c (15) (A)). The several district courts are authorized to review the determination of the Secretary to determine if it is in accordance with law (Sec. 8c (15) (B)). The handler is immune from criminal penalties for violations of the challenged provisions of the order during the proceedings before the Secretary (Sec. 8c (14)). However, the pendency of administrative or judicial proceedings under Section 8c (15) "shall not impede, hinder, or delay" the government "from obtaining relief pursuant to section 8a (6)." But any action under Section 8a (6) "shall abate whenever a final decree has been rendered" in the proceeding under Section 8c (15) (Sec. 8c (15) (B)).

The statute clearly contemplated that an order for the payment of assessments be administratively reviewed. The Act provides for review

not only of the "order" and its "provisions" but of "any obligation imposed in connection therewith". The marketing order here expressly required payment of the amounts "shown on the account rendered" (Section 941.8 (e)) and the amounts "billed" (Section 941.8 (g)) each month. Failure to make the payments is a breach of an obligation imposed by the order. Thus the clause in Section 8c (15) (A) with respect to "any obligation" clearly includes obligations to pay assessments into producer settlement funds. Indeed it cannot be doubted that this familiar type of obligation[8] was precisely what Congress intended by the use of the phrase.

The creation of a special administrative forum to determine the legality of marketing orders of the Secretary of Agriculture and of the obligations imposed by such orders and the various aspects of finality attaching to its determinations strongly impel the conclusion that it was given exclusive primary jurisdiction of the matters within its competence. This conclusion is supported by the nature of the questions involved in such determinations. The Act deals with problems the complexity of which have been recognized by this Court. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533; *United States* v.

[8] See *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 552–553n, 555; *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 594.

Wrightwood Dairy Co., 315 U. S. 110. The provisions of the Act governing milk marketing orders (7 U. S. C. 608c (5)) and the provisions of the order now before the Court (which is representative of the many other outstanding milk orders) show the complex and technical nature of the questions to which they give rise.

This is true as to the type of determination involved in this case, which does not present merely a mathematical or accounting problem. On the contrary, as is suggested by respondent's answer (R. 72), the issues relate to the accuracy and completeness of "tests of the defendants' milk and milk products" and as to whether "certain quantities of milk and milk products were not properly or correctly allocated, distributed or divided by the market administrator or his representatives into the classes of milk and milk products set forth in the orders and amendments alleged." Such questions of classification are obviously matters which should properly first be submitted to an agency possessing special competence in the field.[6]

[6] For examples of cases in which problems of the sort involved here have been considered on petitions for administrative relief, see *In the Matter of the Petitions of Grandview Dairy, Inc., and Arkport Dairies*, 1 Agr. Dec. 133; *In the Matter of the Petition of Harold W. Holden, et al.*, 1 Agr. Dec. 524; *In the Matter of the Petition of Ogden Dairy Co.*, 2 Agr. Dec. 558; *In the Matter of the Petition of C. J. Wieland & Sons Dairy Products Co.*, 2 Agr. Dec. 647; *In the Matter of the Petition of Dellwood Dairy Co.*, 3 Agr. Dec. 1053.

This conclusion finds further support in the fact that enforcement proceedings under Section 8a (6) may be instituted and prosecuted pending final termination of the proceedings under Section 8c (15). Even apart from the burden which it would place on the district courts, it is not reasonable to suppose that Congress, having created a forum possessing special competence, would authorize district courts concurrently to determine the very question delegated to the specialized forum. It is also not reasonable to suppose that Congress intended to create a situation where the same district court or different district courts would be simultaneously considering the same question, originally in one case, and on review in another case. The conclusion seems inescapable that Congress intended the district courts to have power to consider the validity of marketing orders only when reviewing determinations made by the Secretary in proceedings under Section 8c (15) (A).

The decision of the court below is also erroneous because it disregards the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51. While the rule was applied to a plaintiff in that case, the controlling considerations appear identical irrespec-

tive of whether applied to a plaintiff or a defendant. Cf. *Bradley* v. *Richmond*, 227 U. S. 477, 485–486. It is settled that there are no constitutional objections to the application of the doctrine to a defendant. *Bowles* v. *Willingham*, 321 U. S. 503; *Yakus* v. *United States*, 321 U. S. 414; *Falbo* v. *United States*, 320 U. S. 549. And its application to the respondents will not result in irreparable injury since the market administrator is required to maintain a reserve to provide against the contingencies of errors in report or payments (Sec. 941.7 (b); R. 60).

3. The question presented is of major importance in the administration and enforcement of the Act. The Secretary of Agriculture believes that the successful operation of the Chicago and other milk orders is due in major part, to the fact that the courts, in enforcement proceedings, have refused to pass upon the validity of obligations imposed upon handlers by the milk orders. This is so for two reasons: First, questions which may be involved in determining the legality of the obligations imposed by these orders are so complex and technical that their correct, uniform and prompt decision requires the informed judgment of a specialized forum. Second, in accordance with the provisions of the Act, each milk order creates a producer-settlement fund, commonly referred to as an equalization pool, which is extremely sensitive to any disturbance in its

operation.[7] Failure of even a single handler to make the required payments into the pool causes an immediate breach in the equalization of costs to handlers and a reduction in the price to producers.[8] As a practical matter, therefore, the successful operation of the equalization pool is directly dependent upon prompt compliance by all handlers with requirements of the order. The effect of the decision of the court below is to nullify a carefully devised statutory procedure designed to secure these important advantages. Clearly, if handlers are permitted in an enforcement proceeding to raise all questions cognizable by the Secretary in a proceeding under Section 8c (15) there will be no incentive to utilize the administrative procedure to determine issues which in the present advanced stage of the program are primarily factual rather than constitutional.[9]

The effect of the decision below is also to create confusion and uncertainty in the enforcement of the Act. There are at least 47 orders issued under the Act in effect in various marketing areas

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[7] The operation of these equalization pools is described in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 571.

[8] For the method of computing the uniform price payable to producers, see *supra*, p. 5.

[9] The constitutionality of the act has been sustained. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533; *H. P. Hood & Sons* v. *United States*, 307 U. S. 588.

throughout the United States. Only two circuit courts of appeals have passed upon the question of whether the district courts in an enforcement action must determine the validity of an order or obligation under an order. Because of their conflicting decisions, there will be uncertainty and confusion in the district courts in other circuits and as to what action is advisable by the Government with reference to instituting enforcement proceedings.

We believe that the importance of the problem in the administration and enforcement of the Act and of orders issued thereunder merits review by this Court. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413; *Wallace Corporation* v. *National Labor Relations Board*, 323 U. S. 248, 251; *Stark* v. *Wickard*, 321 U. S. 288, 289.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

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No. 54

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH RUZICKA AND CHARLES RUZICKA, INDIVIDUALLY, AND AS CO-PARTNERS, TRADING AS SEELEY DAIRY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court did not render an opinion. Its findings of fact and conclusions of law appear in the record (R. 117–121). The opinion of the Circuit Court of Appeals (R. 135–141) is reported in 152 F. 2d 167.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 30, 1945, and a petition for rehearing was denied on January 5, 1946 (R.

144). A petition for certiorari was filed on March 7, 1946, and was granted April 22, 1946 (R. 146). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., sec. 347).

QUESTION PRESENTED

Whether, in a proceeding under Section 8a (6) of the Agricultural Marketing Agreement Act of 1937 to enforce compliance with obligations imposed upon the defendants by a milk marketing order issued under Section 8c of the Act, the defendants, after having admitted noncompliance with the order, may assert as defenses alleged administrative errors in the determination of their obligations under the order before the administrative remedy specifically provided by Section 8c (15) has been exhausted.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. sec. 601 *et seq.*) which reenacted, with amendments, the Agricultural Adjustment Act of 1933 as amended (48 Stat. 31, 48 Stat. 670, 49 Stat. 750). The pertinent provisions of Sections 8a and 8c of the Act are as follows:

> 8a (6). The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement,

heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts. [48 Stat. 675].

* * * * *

8a (8). The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity [48 Stat. 675].

* * * * *

8c (15) (A). Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law. [49 Stat. 760.]

8c (15) (B). The District Courts of the United States (including the District Court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested

with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15). [49 Stat. 760.]

The pertinent provisions of the Administrative Procedure Act are set forth at pp. 46, 49–50, *infra*.

The order involved is Milk Order No. 41—Chicago, Illinois, Marketing Area, issued under the

Act by the Secretary of Agriculture on June 27, 1941, effective July 1, 1941 (6 Fed. Reg. 3130), and set forth in full in the record (R. 43–65). Subsequent amendments and suspensions have been issued which are not material to this case.[1] The order was issued after a public hearing upon the basis of the evidence taken as required by Sections 8b and 8c (3) (4) of the Act. It was approved by the President following approval by a specified percentage of producers as required by Section 8c (9) of the Act (6 Fed. Reg. 3159–3160). The Secretary of Agriculture is authorized to terminate the order whenever he finds that it does not tend to effectuate the declared policy of the Act, and he is required to terminate the order upon the request of a prescribed percentage of producers (Sec. 8c (16) (A) (B)).

Order No. 41 was before this Court in *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110.[2]

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[1] Amendment No. 1 was issued August 29, 1941, effective September 6, 1941, 6 Fed. Reg. 4552 (R. 65–69); and Amendment No. 2 was issued January 23, 1943, effective February 1, 1943, 8 Fed. Reg. 1258 (R. 79–83). A general amendment affecting several orders, including the Chicago Milk order, was issued June 12, 1943, effective June 21, 1943, 8 Fed. Reg. 8294 (R. 85–88). Suspensions of certain provisions of the order have been issued from time to time as set forth in 7 Fed. Reg. 10905; 8 Fed. Reg. 5358; 9 Fed. Reg. 3063, 11307; and 10 Fed. Reg. 1, 3509.

[2] The order there considered was issued August 28, 1939, effective September 1, 1939, 4 Fed. Reg. 3764 (R. 7–22). It was reissued with amendments by an order on June 21, 1940,

The purpose of the order is so to regulate the handling of milk in the Chicago Marketing Area as to effectuate the declared policy of the Act to establish and maintain the purchasing power of producers at certain specified levels (Act, secs. 2 and 8c (18) (50 Stat. 247); Order, sec. 941.0; R. 45). This is accomplished by creating and maintaining orderly marketing conditions under which all producers are required to share equitably the burden of temporary surpluses of milk which are the inevitable concomitant of a constantly adequate supply. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 550.

The order fixes a use value, uniform as to all handlers, for each of four classes of milk[2] (Order, sec. 941.4, 941.5; R. 49–58). Each handler is required to report to the market administrator the quantity of milk used in each class (Order, sec. 941.3 (a); R. 48–49). The market administrator adds the use values of the milk of all handlers and the cash balance in the producer-settlement fund, divides such total by the total

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effective July 1, 1940, 5 Fed. Reg. 2337 (R. 22–43), which was in turn reissued with amendments by the order involved herein.

[2] Roughly speaking, the four classes are: I. Milk disposed of in the form of fluid milk; II. Milk disposed of in the form of flavored milk, cream, cottage cheese or ice cream; III. Milk the butterfat from which is used to produce products not specified in classes II and IV and bulk milk disposed of to bakeries, soup and candy manufacturing companies; IV. Milk the butterfat from which is used to produce butter and cheese (except cottage cheese). (R. 50.)

quantity of milk, and announces the result as a uniform price to be paid by handlers to producers (Order, sec. 941.2 (e), R. 48; sec. 941.7, R. 59–60). Certain adjustments are required to be made in the course of computation by the market administrator, including adjustments to reflect butterfat and location differentials. Additionally, the market administrator is required to subtract from what would otherwise be the uniform price not less than four cents nor more than five cents per hundredweight of milk "to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers" (Order, sec. 941.7 (b) (5); R. 60).

The variance among handlers in the percentage of milk used in a given class will normally mean that the use values for a handler may be greater or less than payments at the uniform price required to be made by him to producers. Handlers for whom there is a plus difference are required to pay the difference into a producer-settlement fund, while a handler for whom there is a minus difference is entitled to receive the difference from the fund, in accordance with a transcript of account furnished by the market administrator (Order, sec. 941.8; R. 60–62).

Each of the steps in the operation of the producer-settlement fund is required to be taken on or before a specified date during the month

immediately following the monthly delivery period. Handlers' reports must be filed not later than the 10th day (Order, sec. 941.3; R. 48–49). The announcement by the market administrator of the uniform price to producers is required to be made not later than the 14th day (Order, sec. 941.2 (e) (2); R. 48). Payments for the producer-settlement fund are required to be made by handlers to the market administrator not later than the 16th day, and payments out of the fund by the market administrator to handlers not later than the 17th day (Order, sec. 941.8; R. 60–61). Each handler must make payment of the uniform price to producers not later than the 18th day (*ibid.*) and file a report of such payment not later than the 25th day (Order, sec. 941.3 (a) (5); R. 49).

Handlers are required to keep, and to make available for inspection by the market administrator, records of their receipts and utilization of milk. The administrator is required to verify reports and payments of handlers by an audit of such records (Order, sec. 941.3 (b); R. 49). All errors must be promptly adjusted by additional payments into or out of the producer-settlement fund. Such payments by handlers into the fund must be made within five days after receipt of a bill from the administrator, and such payments to handlers out of the fund must be made by the market administrator within five days after disclosure of the error (Order, sec. 941.8 (g); R. 61–62).

STATEMENT

On September 15, 1942, the United States, the present petitioner, filed its complaint in the United States District Court for the Northern District of Illinois in which it sought to compel the respondents to comply with Order No. 41, as amended (R. 3–6). An answer was filed on November 13, 1942 (R. 70–73). A supplemental complaint* was filed on April 10, 1944 (R. 73–78), and an answer to the supplemental complaint was filed on May 8, 1944 (R. 89–95).

The material allegations of the supplemental complaint are as follows: Respondents, handlers of milk, have filed reports with the market administrator from which the market administrator has made computations and rendered respondents monthly a transcript of their account with the producer-settlement fund, all as required by Order No. 41, as amended (R. 75). In violation of Section 941.8 (e) (R. 61) of the Order (which requires each handler on or before the 16th day after the end of each delivery period

*The original complaint included Frank Ruzicka, a copartner, as a defendant and sought recovery of money due for delivery periods prior to April 1, 1942. It later appeared that Frank Ruzicka had entered the military service on April 1, 1942, and, upon request of respondents, the district court entered an order on June 25, 1943, withdrawing the case based upon the original complaint from the trial call of the court until the release of Frank Ruzicka from military service (R. 73–74). The supplemental complaint sets forth claims arising since April 1, 1942.

to make full payment to the market administrator of any debit balance "shown on the account rendered"), respondents failed and refused with respect to delivery periods from April 1, 1942, to February 29, 1944, inclusive, to make full payment of the amounts shown to be due, with the result that as of March 16, 1944, respondents were indebted to the market administrator on the basis of their filed reports in the sum of $961.27 (R. 75). The supplemental complaint further alleges that, in accordance with the requirements of the order, the market administrator audited the books and records of respondents, found deficiencies in payments to the producer-settlement fund for the delivery periods commencing April 1, 1942, and ending August 31, 1943, in the sum of $2,119.17, and billed respondents for this amount (R. 75–76). In violation of Section 941.8 (g) (R. 61–62) (which requires the handler to pay within five days "the amount so billed") respondent failed and refused to pay the billed amount (R. 76).[8]

[8] The supplemental complaint also alleged and the district court found that respondents were indebted to the market administrator for their pro rata share of the expenses of administration and for marketing services (R. 76, 119–120). Respondents' answer denied these claims (R. 92). However, after the decision of the Circuit Court of Appeals reversing the judgment of the district court, respondents paid the claimed amounts to the market administrator, and the amounts claimed for administrative expenses and marketing services are therefore not now in issue.

Respondents' answers did not deny the filing of the alleged reports with the market administrator, the receipt of the monthly transcript of their account with the producer-settlement fund based upon the reports filed, the receipt of a bill for shortages disclosed by the audit of the market administrator, or the nonpayment of the debit balance shown on the account rendered or the bill for shortages disclosed by the audit (R. 70, 89, 91). But respondents alleged that any billing by the market administrator, if properly made and applicable to respondents, was based upon an erroneous, improper, incomplete and inaccurate inspection or audit of respondents' reports, books and records and upon findings gathered from and based upon erroneous, improper, incomplete and inaccurate tests of respondents' milk and milk products (R. 91).

Respondents' answer also affirmatively alleged: (1) the invalidity of the issuance of the order because promulgated upon insufficient and inaccurate economic facts (R. 92–93); (2) the invalidity of the continued existence of the order because of its failure to effectuate the declared policy of Congress and its conflict with the declared policy of other acts and orders promulgated thereunder (R. 93–94); and (3) the absence of an affirmative determination by the Secretary of Agriculture of the applicability of the Act and order involved to respondents (R. 94).

Respondents, after answering, petitioned the trial court to stay further proceedings until the final administrative determination of the matters in controversy between the petitioner and respondents in a proceeding under Section 8c (15) (A) of the Act then pending before the Secretary of Agriculture.[6] The petition stated that

[6] The facts in respect to the several petitions for administrative relief filed by respondents under Section 8c(15)(A), and to which they refer in their brief in opposition to the petition for certiorari (p. 7), are set forth in the two opinions which resulted. *In re Ruzicka and Ruzicka*, 3 Agr. Dec. 1049; *In re Seeley Dairy*, 4 Agr. Dec. 825.

The first petition, filed November 2, 1943, was superseded by a petition, filed May 3, 1944, which alleged inapplicability of the Act and Order to respondents, denied any obligations thereunder, challenged the economic bases of the Act and Order, and prayed, among other things, that the Secretary of Agriculture furnish respondents in writing with the "correct and true in law and in fact basis" for the Act, the Order and its amendments, their application to respondents, and their continued existence, to be supported by findings, and that the dairy industry be given representation in the administration of the milk program. An amended petition, adding allegations of errors in the market administrator's determination of respondents' obligations, was filed August 9, 1944, assistance in its preparation having been given respondents' counsel by the Solicitor's office of the Department of Agriculture in order that, as the opinion noted, the petition "might do a minimum amount of violence to the requirements of the rules of practice that petitions comply with the act and contain clear and concise allegations of illegality." *In re Ruzicka and Ruzicka*, *supra* at 1050.

A scheduled prehearing conference on this petition proved ineffective in that respondents' counsel objected that he was unaware that he was to attend a prehearing conference and refused to be bound by anything done. At the hearing, re-

the administrative proceedings would "result in the only fair determination of the rights according to the provisions of said act" and would "afford a full and complete hearing as to the amount of monies, if any, due to the funds administered by the Market Administrator" (R. 95–97). Several months later petitioner moved for judgment on the pleadings (R. 98). At the hearing on this motion respondents requested and were granted leave to withdraw the petition to stay the proceedings (R. 108). At the same hearing respondents petitioned for rules on the petitioner (1) to file a reply to the affirmative defenses in the answer; (2) for a bill of particulars as to the amount of money claimed and the basis of

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spondents' counsel noted that he had not been furnished the written information prayed for, refused to proceed on the merits of his petition, and requested a continuance pending the outcome of this case. In the first of the two opinions above cited the petition was dismissed with leave to file a new petition within thirty days. The opinion stated that respondents "seem to have refused to recognize the existence of the order and its obligations," and that running through their petitions "is a notion that the order is presumptively bad, so much so that [they] will not even deign to conduct their attack upon it until they are supplied with the 'correct in law and in fact basis' for everything about it." *Id.* at 1052.

A new petition was filed January 13, 1945, and on May 18, 1945, a motion filed by respondents, requesting that a reply to the petition be required, was heard and denied. At the hearing on May 29, 1945, respondents moved to continue the hearing to await the outcome of this case and, upon denial of this motion, requested leave to withdraw their petition. This request was granted in the second of the two opinions above cited.

the claim; (3) to strike the motion for judgment on the pleadings; and (4) to have the case set for a hearing before a jury (R. 99–106). These motions were denied (R. 116–117).

The trial court granted petitioners' motion for judgment on the pleadings (R. 117–121). It held that, in view of the admissions in the respondent's answer, there were no questions of fact properly before the Court, and "the defendants having failed to avail themselves of the administrative remedy provided by said Act, may not raise such issues of fact before this court" (R. 117). The final judgment of the district court, entered October 20, 1944, required the respondents to pay to the market administrator the sums claimed in the supplemental complaint and such additional sums as are found to be due for subsequent delivery periods down to the date of the entry of judgment and also restrained respondents from further violations of the order (R. 121–123). The court retained jurisdiction to await the outcome of the then pending administrative proceedings.

Respondents appealed to the Circuit Court of Appeals for the Seventh Circuit, which entered an order on October 30, 1945, reversing the judgment of the district court and remanding the case for further proceedings in accordance with the views expressed in the opinion (R. 142). The majority opinion held that the trial court erred in holding that respondents were not entitled to challenge the legality of the obligations imposed

by the order in a compliance proceeding (R. 135–141). Judge Kerner, dissenting from this holding, was of the opinion that Section 8c (15) provided the exclusive procedure for determining the legality of an obligation imposed under the order (R. 141). A petition for rehearing was filed on November 13, 1945, and was denied on January 5, 1946 (R. 144).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that in an enforcement action under Section 8a (6) of the Act, the district court could not, upon a showing of noncompliance, require the respondents to discharge their obligations under the Order pending exhaustion of their administrative remedy under Section 8c (15) of the Act for a modification of such obligations.

2. In holding that where the market administrator bills a handler for sums due based on filed reports, the handler is entitled to a trial on all fact issues in an enforcement action.

3. In holding that the district court was in error in refusing to permit the respondents to present evidence to show alleged error in the billings of the market administrator by reason of an inaccurate inspection or audit of respondents' records and findings based upon improper, incomplete, and inaccurate tests of respondents' milk and milk products.

4. In failing to hold that the administrative proceeding by a handler under Section 8c (15) of the Act is the sole remedy to settle disputes with respect to the legality of obligations imposed on the handler under a milk order.

5. In failing to hold that Section 8a (6) of the Act, in the light of the mandate expressed in Section 8c (15) thereof, authorizes the district court to direct compliance by a handler pending a determination of factual issues by the Secretary of Agriculture in the administrative proceeding established by the Act.

6. In ruling that Section 8a (8) of the Act tends to substantiate a belief that Congress did not mean to make the administrative remedy exclusive.

7. In holding that the word "may" in Section 8c (15) of the Act indicates congressional intent that the administrative remedy is permissive rather than exclusive.

8. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

The Agricultural Marketing Agreement Act contemplates that, in the primary interest of producers and upon their approval, the Secretary of Agriculture may issue a milk marketing order whose immediate impact falls upon handlers. The

review and enforcement provisions of the Act disclose a carefully planned pattern for judicial control designed to accommodate the public interest in enforcement of an order and the private interest of handlers in obtaining an equitable and expeditious determination of their obligations. For such determination, Section 8c (15) provides an administrative forum as a means of utilizing the specialized experience of an expert body in achieving a uniform solution of problems which are frequently of great factual complexity. To enable the Government to maintain the continuity and integrity of the program established by the order during the pendency of proceedings before the administrative forum, Section 8a (6) authorizes proceedings by the Government in the appropriate district courts to compel obedience to the terms of an order.

This careful accommodation of public and private interests would be practically nullified if, as the court below held, a handler is permitted to defend an enforcement proceeding on the basis of matters as to which he had a clear and unpursued remedy before the administrative forum. The marketing program created by a milk order is a sensitive mechanism dependent as a practical matter upon substantial compliance by all handlers in the marketing area; it may be broken down by recalcitrant handlers if they are permitted to interject such defenses in enforcement proceedings

and thus prevent the prompt compliance essential to successful operation of the intricate provisions of milk marketing orders. The scheme of the Act would be further violated since the special advantages of the administrative forum created by Congress for the initial solution of problems incident to the application of milk orders would in large measure be lost if courts were required to decide these problems unaided by prior administrative determination.

The exclusivity of the administrative forum not only follows from consideration of the Act as a whole but is also required by specific phraseology. Section 8c (15) (B) provides that the pendency of administrative proceedings instituted by a handler shall not "impede, hinder or delay" an enforcement proceeding by the Government, but that the enforcement proceeding shall abate whenever a final decision has been rendered in the proceedings commenced before the administrative forum. This provision is comprehensible only on the basis that Congress intended the administrative forum as the exclusive one for determination of handlers' obligations. Moreover, Section 8a (8) provides for the non-exclusivity of the Government's remedies, but the Act significantly omits so to provide in respect of the handler's administrative review.

II

The interpretation of the Act here urged is supported by the rule which requires exhaustion of

an available administrative remedy before permitting a litigant to invoke judicial powers. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. The considerations which underlie the rule appear identical whether it is applied to a plaintiff or defendant, and it has in fact been applied to a defendant in a criminal proceeding. *Bradley* v. *Richmond*, 227 U. S. 477.

III

While the Government urges that a proper construction of the Act requires that no defenses are available as to which there is an administrative remedy, the present case does not require decision as to the availability of defenses based upon unconstitutionality of, or lack of statutory authority for, a milk order. The alleged errors in audits of respondents' records and in tests of their milk, were not simply mathematical miscalculations, but were concerned with the utilization and testing of milk—technical matters which the administrative forum is particularly qualified to determine and as to which the doctrine of exhaustion of administrative remedy is peculiarly applicable. Imposition of this principle does not in any way prejudice the rights of handlers, since the fund for the correction of errors which the Market Administrator is required to maintain assures payment of any amount which is found to be owing to a handler.

IV

The Administrative Procedure Act, passed after this court granted certiorari, is inapplicable here, both because the statute was not meant to affect cases which have reached the appellate stage before its enactment, and because it does not alter the previous law as to judicial review in any respect material here.

ARGUMENT

I

THE ACT PROVIDES AN EXCLUSIVE ADMINISTRATIVE FORUM TO WHICH HANDLERS ARE CONFINED FOR A DETERMINATION OF THEIR OBLIGATIONS UNDER MARKETING ORDERS

A consideration of the Agricultural Marketing Agreement Act as a whole clearly discloses the intention of Congress to make the administrative forum the exclusive one for determination of the extremely complex factual problems certain to arise in the administration of the Act. The statutory review and enforcement provisions present a rounded scheme in which, for the benefit of private parties, the administrative forum is provided as an equitable and expeditious method for safeguarding their rights and in which, for the benefit of the Government, enforcement proceedings in the courts are provided to enable maintenance of the functioning of marketing programs while private rights are being tested before the administrative forum.

The Act can be considered only in the light of the factual situation and the general problems with which it sought to deal. A primary motivation of the Act was the milk problem,[7] an "exquisitely complicated" one.[8] This Court has noted the difficulties of the problem and has summarized its history in decisions sustaining both State and Federal action designed to solve or ameliorate it. *Nebbia* v. *New York*, 291 U. S. 502; *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

The solution which Congress achieved in the Agricultural Marketing Agreement Act has been upheld by this Court in its substantive provisions as against various challenges. *United States* v. *Rock Royal Co-operative, Inc., supra; H. P. Hood & Sons, Inc.* v. *United States*, 307 U. S. 588; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110. The construction now placed on its procedural provisions by the Circuit Court of Appeals, if permitted to stand, will substantially undermine operations under the Act since a sufficient number of recalcitrant handlers would be in a position to prevent effective operation of orders issued pursuant to it.

In view of the requisites necessary to issuance

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[7] Sections 8c (5) and 8c (18) concern exclusively milk marketing problems (see 81 Cong. Rec. 3594, 4963, 4969).

[8] *Queensboro Farms Products* v. *Wickard*, 137 F. 2d 969, 974 (C. C. A. 2).

of an order, it is plain that Congress must have had in mind the possible difficulty of enforcing the marketing orders contemplated by the Act due to lack of support by or actual hostility of handlers. The Act, as is evident from its declaration of policy, was framed primarily in the interests of producers, but its immediate impact perforce falls upon handlers. A milk order may be issued by the Secretary of Agriculture if handlers of not less than 50% in volume of the commodity sign a marketing agreement, and the order is approved by two-thirds of the producers or by producers of two-thirds in volume (Sec. 8c (8)). However, notwithstanding the failure or refusal of the requisite percentage of handlers to sign a marketing agreement, the Secretary may issue an order, with the approval of the President, if he determines that the handlers' refusal to sign tends to prevent effectuation of the Act's policy and that issuance of the order is the only practicable means of aiding producers and is approved by two-thirds of producers or by producers of two-thirds in volume (Sec. 8c (9)). The Act thus affirmatively contemplates the issuance of orders which a majority of handlers have failed or refused to approve, and the problem of appropriate enforcement remedies, which at the same time preserve the rights of handlers, is thus explicitly posed.

The enforcement and administrative-review provisions which the Act now contains were

described by both the Senate Committee on Agriculture and Forestry and the House Committee on Agriculture as intended to "establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms."[9] Care was taken to safeguard fully the rights of all handlers affected by the issuance of orders under the Act. Under Section 8c (15) (A) "any handler subject to an order may file a written petition with the Secretary," objecting to such order or its application to him. The Secretary is then required to afford him a hearing under regulations to be prescribed,[10] and, after such hearing, to make a ruling upon the handler's petition. The appropriate federal district courts are vested by subparagraph (B) with jurisdiction to review such ruling to determine whether it is "in accordance with law."

Equal care was taken by Congress to assure that the program established by any marketing order could not be broken down by litigious noncompliance. Section 8a (6) vests the several district courts "with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order" issued pursuant to the

[9] S. Rep. No. 1011, p. 14, H. Rep. No. 1241, p. 14, 74th Cong., 1st sess.

[10] The Secretary's regulations governing the administrative review procedure are set out in 6 Fed. Reg. 6570–6582; 7 C. F. R. Cumulative Supplement, par. 900.50 *et seq.*

Act. It is further provided in paragraph (8) that the remedies set forth in Section 8a "shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity." Congress thus made clear its recognition of the enforcement problem as one of major importance in providing the strong and unusual remedy of mandatory injunction [11] to force compliance under Section 8a (6), and by specifically stipulating that it should not be exclusive.

It is submitted that the statutory design would be violated and partially nullified by an interpretation permitting a handler to interpose to an enforcement proceeding any and all possible defenses, including matters as to which he has a clear and unpursued administrative remedy with subsequent access to the courts. Sections 8c (15) and 8a (6) are, in effect, complementary. The former was specifically intended to afford persons affected by orders a complete and exclusive manner of testing their rights; the latter was intended to enable the Government to maintain the program while the administrative remedy was being pursued.

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[11] In *United States* v. *Adler's Creamery, Inc.*, 110 F. 2d 482 (C. C. A. 2), certiorari denied, 311 U. S. 657, it was ineffectually contended that it was inequitable to compel payment of money into the producer-settlement fund by mandatory injunction.

Establishment of the producer-settlement fund or its equivalent is affirmatively contemplated by the Act.[12] Its successful operation is directly dependent, as a practical matter, upon prompt compliance by all handlers with the requirements of an order. The Secretary of Agriculture believes that the successful operation of the Chicago order and other milk orders is due in major part to the fact that the courts, in enforcement proceedings, have refused to pass upon the validity of obligations imposed upon handlers by the milk orders.

The producer-settlement fund, commonly referred to as an equalization pool, is characterized by a symmetry which makes it extremely sensitive to the slightest disturbance in operation. The default of a single handler causes an immediate breach in the equalization of cost to handlers and a reduction in price to producers.[13] The unfair advantage gained by a defaulting handler is such as to constitute a strong inducement to his competitors to make similar defaults. The time required for enforcement proceedings against handlers permitted to interpose all defenses might

[12] Section 8c (5) provides that in the case of milk, orders shall contain one or more of certain terms or conditions among which are provision of "a method for making adjustments in payments, as among handlers * * *, to the end that the total sums paid by each handler shall equal" the use values of the milk purchased by him.

[13] See *supra*, pp. 6–7, for the method of computing the uniform price payable to producers.

result in inability to procure sufficient funds to enable the equalization pool to operate effectively.

If a noncomplying handler knows that, irrespective of the period of noncompliance and of failure to proceed to procure administrative relief, all defenses are available in an enforcement proceeding, there will be no incentive to proceed under Section 8c (15). The provisions for an administrative remedy and judicial review may thus be practically nullified. The questions which may be involved in determining the legality of the obligations imposed by these orders are so complex and technical that their correct, uniform and prompt decision requires the informed judgment and accumulated experience of a specialized forum.

The view of congressional intent compelled by a consideration of the Act as a whole is reinforced by specific phraseology. Section 8c (15) (B) provides that "the pendency of proceedings instituted [by a handler] pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to Section 8a (6)" of the Act. And "any proceedings brought pursuant to section 8a (6) * * * shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

These explicit provisions are comprehensible only on the basis that Congress intended the remedy available to handlers under subsection (15) to be their exclusive method for testing the obligations of orders. The provision that any injunction obtained in an enforcement proceeding shall abate upon completion of proceedings under subsection (15) shows that where administrative relief is sought enforcement proceedings under Section 8a (6) were primarily important as a means of preserving effective operation of orders during the pendency of the proceeding. In a proceeding under Section 8c (15) (B) the Government is permitted to seek permanent injunctive relief under Section 8a (6) by way of counterclaim.

A construction permitting the present type of defense in an enforcement proceeding would lead to anomalies. It would be necessary to assume that Congress, having created a specialized forum, would authorize district courts concurrently to consider the very problems delegated to the specialized forum, and this despite the recognized complexities of marketing problems and the manifest need for an informed administrative tribunal to bring special competence to bear on the factual problems involved. Moreover, the ruling of the Secretary might be appealed to the same district court, which would then have before it the identical question in two proceedings, one as an

original matter and one on review. Or two district courts might be concurrently and properly considering the identical question between the same parties. The different records compiled before the judicial and administrative forums or the requirement that the district court accord finality to the Secretary's determination of facts might create irreconcilable conflicts.[14]

It cannot be supposed that Congress intended to countenance a situation which is the antithesis of orderly procedure. The exclusivity of the administrative forum for the initial determination of the handler's asserted rights is plainly required to avoid such a possibility. Concurrent proceedings before the administrative and judicial forums also create the opportunity for playing one forum

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[14] Factual problems in which the findings of the Secretary have been sustained in review proceedings have involved the relative merits of milk from Holstein and Guernsey cows (*New York State Guernsey Breeders Co-op.* v. *Wickard*, 141 F. 2d 805 (C. C. A. 2), certiorari denied, 323 U. S. 725); the classification of cream added to buttermilk to improve its quality (*Waddington Milk Co.* v. *Wickard*, 140 F. 2d 97 (C. C. A. 2)); whether refrigerating rooms in which a dairy company placed cream before delivery to purchasers constituted a "second plant." (*Wetmiller Dairy & Farm Products Co.* v. *Wickard*, 149 F. 2d 330 (C. C. A. 2)); the reasonableness of a line of demarkation drawn 31 miles from the center of the marketing area within which a receiving station allowance may not be deducted by a milk handler (*Wawa Dairy Farms* v. *Wickard*, 149 F. 2d 860 (C. C. A. 3); and whether buttermilk is an "homogenized mixture" (*M. H. Renken Dairy Co.* v. *Wickard*, 45 F. Supp. 332 (E. D. N. Y.)).

against the other for delay or other purposes. Congress did not intend to give the violator of an order the option of testing its validity administratively or in the enforcement court. The history of this case itself sufficiently illustrates the possibilities. Respondents on two occasions requested continuances of proceedings before the administrative forum to await the outcome of this case, and once petitioned the district court for a stay of proceedings before it pending determination by the administrative forum on petitions before it (*supra*, pp. 12–13).

It should be observed that respondents are in no manner harmed or prejudiced by being required to resort to the administrative forum for determination of the present controversy. The Secretary's regulations governing the administrative review procedure set no limit upon the time within which a handler shall petition for modification of an order or of his obligations under an order.[15] The milk order provides for the contingency of relief to handlers in an administrative proceeding by making a cash reserve each month in connection with the operation of the producer-settlement fund (Order, Sec. 941.7 (b) (5); R. 60). At the time of entry of judgment in this case, the cash balance on hand for this general purpose was $102,418.05.[16]

[15] Secretary's Regulations, 6 Fed. Reg. 6570–6582, particularly Regulation 900.52; 7 C. F. R. Cumulative Supplement, par. 900.52.

[16] Monthly publication entitled: *Statistical Summary with*

None of the three arguments which the court below enumerated (R. 138–141) in favor of its interpretation are persuasive. The provision of Section 8a (8) that the remedies provided *in that section* are non-exclusive does not substantiate a belief that Congress thereby indicated a general tendency to make all special statutory remedies non-exclusive. This provision is limited by its express terms to Section 8a, which afforded remedies to the Government only and, in fact, is a congressional recognition of the difficulties of the enforcement problem and the necessity for according unusual powers to the Government to meet it. The fact that Congress stipulated that procedural provisions inserted primarily for protection of the Government were not exclusive and failed so to stipulate with respect to procedural provisions (Section 8c (15)) inserted primarily for protection of private parties, suggests very strongly that the latter provisions are exclusive.

Nor is it of any significance that Section 8c (15) (A) in providing administrative relief for the handler, states that he "may" petition the Secretary of Agriculture. No inference is thereby created that this remedial provision is one of several available to the handler which he *may* use in preference to some other. Use of the

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Price Computations, November 16, 1944, Federal Milk Market Administrator, Chicago, Illinois, Marketing Area, United States Secretary of Agriculture.

permissive "may" rather than the mandatory "shall" is obviously required since otherwise every handler, though satisfied with an order, would be ordered by the Act to petition for some modification of that order or its application to him.

Finally, the court observed that the "statute recognizes the possibility of concurrency of remedies" (R. 138). But this avoids the question, since the statute recognizes only the Government's need for summary enforcement proceedings during the period in which any issues raised by a handler in the orderly method provided by the statute are determined through administrative proceedings and judicial review thereof. The court apparently based its view on the requirement that the decree in an enforcement proceeding abates upon conclusion of proceedings instituted in the administrative forum, which requirement of itself establishes the supremacy, and therefore the exclusivity of, the latter proceedings for the adjudication of the grievances of handlers.

The court below, while enumerating the foregoing arguments, placed primary reliance on what it considered to be the failure of Congress to say in *haec verba* that the administrative proceedings should be the sole and exclusive remedy open to handlers (R. 140–141). This view overlooks the congressional intention, manifest both

from a consideration of the Act as a whole and from the statutory provisions already mentioned, which concretely evidence the purpose to make administrative proceedings under Section 8c the exclusive forum for initial determination of handlers' grievances, by providing (1) that the administrative review should not impede, hinder, or delay enforcement proceedings, (2) that enforcement proceedings shall abate on conclusion of proceedings instituted in the administrative forum, and (3) that the enforcement remedies given the Government shall be nonexclusive while significantly omitting so to provide in respect of the relief through administrative review given to the handler. In the light of settled judicial principles considered in Point II, Congress may have considered more explicit phraseology both unnecessary and unduly hampering.

II

THE CONSTRUCTION URGED BY THE GOVERNMENT IS SUPPORTED BY ESTABLISHED PRINCIPLES OF JUDICIAL ADMINISTRATION

It is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51. The doctrine involves a policy of orderly procedure which favors a preliminary administrative sifting process (*Federal Trade*

Commission v. *Claire Furnace Co.*, 274 U. S. 160, 174), which is particularly desirable with respect to matters peculiarly within the competence of the administrative authority (*Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, 311), or where uniformity is essential to comply with the purposes of the regulatory statute (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125). The doctrine serves to prevent attempts "to swamp the courts by a resort to them in the first instance." *United States* v. *Sing Tuck*, 194 U. S. 161, 170.

Apart from the decision of the court below in the present case, the lower federal courts, after recognizing that the Agricultural Marketing Agreement Act by its terms gives supremacy to the administrative remedy, have uniformly applied the above rule in refusing to permit defenses of the type here asserted in an enforcement proceeding under Section 8a (6).[17]

While it is true that the rule is usually applied to a plaintiff, the controlling considerations as

[17] *LaVerne Co-op Citrus Ass'n* v. *United States*, 143 F. 2d 415 (C. C. A. 9); *United States* v. *Ridgeland Creamery Co.*, 47 F. Supp. 145 (W. D. Wis.); *United States* v. *Hogansburg Milk Co.*, 57 F. Supp. 297 (N. D. N. Y.); *United States* v. *Wood*, 61 F. Supp. 175 (D. Mass.); *United States* v. *Burlington Sanitary Milk Co., Inc.*, decided October 16, 1944 (E. D. Wis., unreported); cf. *Bailey Farm Dairy Co.* v. *Jones*, 61 F. Supp. 209, 229 (E. D. Mo.). See *United States* v. *Superior Court*, 19 Cal. 2d 189, 120 P. 2d 26.

expressed in recent cases appear identical in their application whether the party against which the rule is invoked is a plaintiff or a defendant. See *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 342; *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, 311; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 404; *Macauley* v. *Waterman S. S. Corp.,* No. 435, October Term, 1945, slip op., pp. 2–3). As the Circuit Court of Appeals for the Ninth Circuit noted in *La Verne Co-op. Citrus Ass'n* v. *United States,* 143 F. 2d 415, 420:

> The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the issue is raised by defending parties as where it is raised by moving parties. A consideration of the defense in an enforcement action would nullify the uniformity achieved by devising a single procedure for testing orders promulgated in accordance with the terms of the Act.

The rule has in fact been applied even to a defendant in a criminal proceeding. In *Bradley* v. *Richmond,* 227 U. S. 477, a defendant convicted for violation of a municipal ordinance forbidding the conduct of certain businesses without a license was not permitted to defend on the basis of his alleged discriminatory classification since he had failed to pursue an available administrative remedy where the alleged error in classification

could have been presented and, if necessary, corrected. As pointed out in *Yakus* v. *United States*, 321 U. S. 414, 445, it has been held that one who has failed to avail himself of the statutory method of review of orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, or of the Federal Radio Commission under the Radio Act of 1927, cannot enjoin threatened prosecutions for violation of these orders. *United States* v. *Corrick*, 298 U. S. 435, 440; *White* v. *Johnson*, 282 U. S. 367, 373–374.[18]

Even though Congress has not provided for judicial review of the final administrative determination, a defendant in a criminal proceeding for violation of the Selective Service Act cannot set up as a defense asserted errors of the administrative body until he has exhausted the remedy available to him within the administrative scheme. *Falbo* v. *United States*, 320 U. S. 549; *Estep* v.

[18] The United States has successfully enjoined the continued operation of a radio broadcaster whose application for renewal of license the Federal Radio Commission refused to grant. The broadcaster was not permitted to attack the order of the Commission without first exhausting the remedy afforded by the Radio Act. *American Bond & Mortgage Co.* v. *United States*, 52 F. 2d 318 (C. C. A. 7), certiorari denied, 285 U. S. 538. In granting an injunction restraining violation of a wage order promulgated under the Fair Labor Standards Act, the court refused to consider attacks on the validity of the wage order and its applications to defendants, on the ground that the Act provided an administrative procedure for such attacks. *Walling* v. *Cohen*, 48 F. Supp. 859 (E. D. Pa.), affirmed, 140 F. 2d 453 (C. C. A. 3).

United States, No. 292, decided Feb. 4, 1946; *Billings* v. *Truesdell*, 321 U. S. 542, 558. There is no constitutional objection to the application of the doctrine to a defendant, though he is thereby prevented from setting up as a defense to an indictment for violation of a regulation the alleged unconstitutionality of the regulation and its application to him. *Yakus* v. *United States, supra.* See *Lockerty* v. *Phillips*, 319 U. S. 182; *Bowles* v. *Willingham*, 321 U. S. 503.

The *Rock Royal* and *Wrightwood Dairy* cases do not support a view contrary to that here advanced. In both cases, though the Government was successful in forcing handlers to comply with the provisions of milk orders, this Court fully considered, before rejecting, contentions by the defendants asserting unconstitutionality of the orders or their application, or lack of statutory authority for such orders. However, the Government did not in either case object to this Court's consideration of these questions on the basis of the principles now under discussion since in the early years of enforcing milk orders it was obviously desirable as a practical matter to settle speedily the important questions of constitutional and statutory law. Questions which merely lurk in the record, and which are neither brought to the Court's attention nor ruled upon, are not to be considered as having been so decided as to constitute precedents. *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 279.

It is also to be noted that this Court need not here determine whether enforcement proceedings may be defended on the basis of well-pleaded constitutional or statutory objections to orders issued under the Act, such as were considered in the *Rock Royal* and *Wrightwood* cases. In the *La-Verne* case, *supra*, at p. 420, the court specifically stated that it was not determining whether an infirmity *apparent on the face of the order* would constitute a valid defense.[19] The Government has contended that a proper construction of the Act requires a holding that no defenses are available in an enforcement proceeding which may be raised in the administrative forum, but, if this Court should not agree, then it is plain that the defenses of which respondents here seek to avail themselves are of a type which render peculiarly applicable the principle of judicial administration which would require their reference to the administrative forum for determination.

III

THE DEFENSE WHICH RESPONDENTS SEEK TO RAISE HERE IS APPROPRIATE FOR PRIOR ADMINISTRATIVE DETERMINATION

The single defense of possible merit is that any billing by the market administrator was based upon an audit of respondents' records and upon

[19] Cf. *United States* v. *Sing Tuck*, 194 U. S. 161, 168, where the Court remarked "• • • it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way."

tests of their milk and milk products which were erroneous and incomplete. It has been specifically determined that such a defense, challenging the market administrator's determination of the handler's obligations, may not be raised in an enforcement proceeding, but may only be made the subject of a petition for administrative relief. *United States* v. *Ridgeland Creamery Company, United States* v. *Hogansburg Milk Company, United States* v. *Wood,* all *supra,* note 17, p. 33. It is readily apparent, in view of the manner in which a milk order is necessarily administered, that a defense of this character opens a wide range of problems of precisely the type for solution of which the specialized experience of the administrative body is particularly necessary.

Under the terms of the Order, a handler is compelled to submit reports respecting milk receipts and utilization in the detail and on forms prescribed by the market administrator (Order, Section 941.3 (a); R. 27–28). The market administrator is required to "verify all reports and payments of each handler by audit of such handler's records" and by tests of the handler's milk and milk products (Order, Section 941.3 (b); R. 28). The determination of a handler's obligations to the producer-settlement fund may thus take initial form from an inspection of the handler's reports, but it must be finally based upon the results of the market administrator's verification

by audit and tests.[20] A defense alleging, but not particularizing, errors in the audits and tests is therefore hardly less than a general denial of any obligation to the producer-settlement fund.

Were a defense of so general a nature permitted in an enforcement proceeding, the courts would necessarily find themselves considering as an original matter intricate and complex problems of milk accounting and economics, as may be illustrated by cases decided by the administrative forum upon petitions for relief under Section 8c (15) (A). Thus, the alleged error in the market administrator's audit might involve his reclassification of milk utilization which turned upon a decision as to the proper temperature at which frozen cream should be stored (*In the Matter of the Petition of Breakstone Bros., Inc.*, 1 Agr. Dec. 26). Or the audit might be challenged on the basis of the conversion factor adopted by the market administrator in determining the milk equivalent in pounds of a 40 quart can of 40 percent cream (*In re Dellwood Dairy Co., Inc.*, 3 Agr. Dec. 1053). Tests of milk for butterfat content may engender controversy on whether

[20] The importance of the verification is obvious; it has been said that "everyone will concede that the efficacy of a classified price plan of milk marketing depends upon adequate checking of handlers' reports to insure their accuracy and truthfulness." (*In re Ferndale Farms, Inc.*, 4 Agr. Dec. 275, 284).

representative and sufficient sampling is assured (*In re Ogden Dairy Co.*, 2 Agr. Dec. 558).[21]

The particular errors which these respondents believe the Market Administrator to have committed in his verification of their reports may be surmised from their petitions for administrative relief previously noted. (*Supra*, note 6, p. 12.) The errors complained of in the amended petition of August 9, 1944 (which the later petition incorporated by reference), included alleged error in the reclassification of milk utilization resulting from the Market Administrator's failure to accept respondents' records, particularly with respect to butter sales,[22] allegedly incomplete and inaccurate spot-tests of the butterfat content of respondents' milk, and alleged impropriety in discounting the weight of chocolate milk due to

[21] For additional examples of alleged errors in the market administrator's verification which have been considered on petitions for administrative relief, see *In the Matter of the Petition of Ladysmith Milk Producers' Cooperative Association*, 1 Agr. Dec. 1; *In the Matter of the Petition of M. H. Renken Dairy Company*, 1 Agr. Dec. 6; *In re International Dairy Company*, 3 Agr. Dec. 953; *In re Hogansburg Milk Co.*, 4 Agr. Dec. 285; *In re Dairymen's League Cooperative Ass'n, Inc.*, 5 Agr. Dec. 143.

[22] The handler's failure to keep records adequate to enable the market administrator to verify a claimed utilization of milk has been frequently held to justify a reclassification of such milk utilization. See *In re Lemont Dairy Company*, 4 Agr. Dec. 913, and decisions cited. Although "it is not necessary that a handler's records contain absolute proof of the reported utilization of milk * * * something more is required than mere unsupported memoranda which cannot be checked for accuracy or veracity." *Id.* at 921.

the inclusion of other ingredients.[23] These objections obviously are not to mechanical calculations; they relate to matters of milk utilization and testing with respect to which there is good reason for requiring submission to an administrator having specialized experience in the field.

It is unreasonable to suppose that Congress in-

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[23] Paragraph 5 of the amended petition (in which respondents herein are "petitioners") reads in part as follows:

"5. Petitioners further complain of the manner of the application of the said Act, orders and regulations, with reference to the use of classification of milk and milk products received, processed and distributed by them; petitioners more specifically complain of the use classification made by the Milk Market Administrator with reference to the following:

"a. The disallowance by the Milk Market Administrator of many and varied sales made by the petitioners at the place of business in Chicago and commonly referred to as "store sales."

"b. The refusal without cause of the Milk Market Administrator to accept the books, records and testimony of the petitioners with reference to the operation of their business and specifically to the form of the milk and milk products sold by petitioners.

"c. Errors in the utilization audit made by the Milk Market Administrator in disregarding information furnished the Milk Market Administrator by the petitioners as to the nature of their business activities.

"d. Errors made by the Milk Market Administrator in 'spot testing' the butterfat content of the milk and milk products purchased, processed and sold by petitioners; petitioners state that said laboratory tests of the butterfat content were inaccurate and incomplete; that a reclassification of the use of said milk and milk products is therefore erroneous and improper;

"e. The refusal by the Milk Market Administrator to ac-

tended problems of this character arising from alleged errors in the market administrator's determination of a handler's obligations to be judicially considered in other than the manner carefully provided pursuant to section 8c (15) and following administrative review. Section 8c (15) (A) provides for administrative review not only of an "order" and its "provisions" but of "any obligation imposed in connection therewith." It cannot be doubted that in the use of this phrase Congress intended specifically to cover the familiar type of obligation to pay assessments into the producer-settlement fund, as that obligation is determined by the market administrator. Creation of the administrative forum would have been pointless, and its special advantages will be lost, if handlers are free to ignore orders of the Secretary of Agriculture and determinations of obligations thereunder by the market administrator, and then resist enforcement proceedings with a defense of the type here relied upon. The provisions of the Act for administrative review may be practically nullified at the very stage in the administration of the Act when the principal controversial questions are no longer constitutional but factual in nature.

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cept the books, records and testimony of petitioners with reference to volume of butter production.

"f. The discounting by the Milk Market Administrator of the weight of chocolate milk due to other ingredients, said discount being an estimate and based upon inaccurate and incomplete information."

Other purported defenses to the present action set up in respondent's answer are based on an alleged lack of economic justification for the order and its conflict with other economic policies assertedly pursued by the Government (R. 92–94). Plainly, these defenses are not matters for judicial cognizance. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 394; *United States* v. *Morgan*, 313 U. S. 409, 417. The Circuit Court of Appeals did not refer in its opinion to any of respondents' so-called "affirmative defenses" (R. 108), but relied wholely on the fact that respondents were precluded by the district court from presenting evidence which allegedly would show error in the market administrator's vertification of respondent's reports (R. 135).

The opinion of this Court in *Stark* v. *Wickard*, 321 U. S. 288, persuasively suggests a rounded interpretation of the Act which would preclude respondents' use in an enforcement proceeding of the defenses here relied upon. The *Stark* case held that a *producer* had standing to question in court the statutory authority of the Secretary to issue an order in respect of matters in which the producer had a specific interest and which he could not raise administratively. The reasoning of the Court indicates that standing to sue would have been denied had the question been merely one of alleged administrative errors in enforcing an order and had an administrative remedy been available.

The problem before the Court was basically one of interpretation, since the Court recognized that the producers' standing to sue depended on "the nature and character of the legislation" (p. 306). While the *Stark* case involved a producer as plaintiff rather than a handler as defendant, the manner in which the Court relied on the *Rock Royal* case (similar to the present one as involving a handler as defendant) suggests that the broad question of statutory interpretation is not basically dissimilar.

Congressional intent to authorize the suit was inferentially interpreted by the Court as being restricted to instances in which the challenge was to constitutional or statutory authority or in which no administrative remedy was available. The Court said (p. 309):

> Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority of the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction.

Further indication that this Court interpreted the Act as restricting suit in the manner suggested

is apparent from its answer to the Government's contention that allowance of the suit would open wide the avenues of litigation. The Court noted, among other answers (p. 310):

> The terms of the Order are largely matters of administrative discretion as to which there is no justiciable right or are clearly authorized by a valid act. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533. Technical details of the milk business are left to the Secretary and his aides.

The combined effect of the *Stark* and *Rock Royal* cases, then, discloses a general pattern of construction of the Act which, at a minimum, precludes parties directly affected by an order from challenging the order by initiating suit or defending an enforcement proceeding on any grounds other than patent lack of authority for the order or absence of an administrative remedy.

IV

THE ADMINISTRATIVE PROCEDURE ACT IS NOT APPLICABLE TO THIS CASE, AND EVEN IF IT WERE APPLICABLE, IT WOULD NOT CHANGE THE RESULT REQUIRED BY THE AGRICULTURAL MARKETING AGREEMENT ACT

A. *The Act does not apply to cases decided in the lower courts before it was enacted.*

The questions here involved are not affected in any way by the Administrative Procedure Act (c. 324, Public Law 404, 79th Cong., 2d Sess., approved by the President, June 11, 1946). It seems clear that the Act is not applicable to this case, as it did not become effective until Septem-

ber 11, 1946,[24] at which time this case was pending on writ of certiorari before this Court. Congress evinced no intent that the Act should operate retroactively. On the contrary, a congressional intent that the Act should operate prospectively only is indicated by the exception in Section 12, which provides that "no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement." Although the definition of "agency proceeding" contained in Section 2 appears not to include a judicial enforcement proceeding brought by an agency, it would be anomalous to suppose that Congress intended to make a procedural requirement of the Act inapplicable to an administrative proceeding initiated before the effective date of the requirement but applicable to a judicial proceeding concluded in the lower courts before the effective date of the requirement.

This Court early announced and has frequently reiterated that "words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States* v. *Heth*, 3 Cranch. 399, 413.

[24] Section 12 of the Act provides that it "shall take effect three months after its approval except that * * * no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement."

Ordinarily statutes must be considered as establishing rules for the future and they will not be applied retrospectively unless such a purpose plainly appears. *Brewster* v. *Gage*, 280 U. S. 327, 337. This rule of construction is one of "general application" which "has been applied by this Court to statutes governing procedure." *United States* v. *St. Louis S. F. & T. Ry.*, 270 U. S. 1, 3.[23]

There is no reason here to depart from this salutary and well-established rule of statutory construction, particularly since it must be assumed that Congress legislated in the light of this familiar principle. If respondents' defense to this suit was improper when tendered, as the Government has contended, a determination that that defense has now been rendered proper by the provisions of the Administrative Procedure Act would constitute a retroactive application of that Act. Congress nowhere evidenced any intention that the Act should be so applied to pending litigation as to require an appellate court to reverse as erroneous a lower court decision which was proper when rendered.

It is, of course, generally true that the function of an appellate court is to apply the law as it

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[23] For examples of cases in which this principle has been applied, see *United States Fidelity and Guaranty Co.* v. *Struthers Wells Co.*, 209 U. S. 306, 316; *United States* v. *American Sugar Co.*, 202 U. S. 563, 577; *Winifree* v. *Northern Pacific Railway Co.*, 227 U. S. 296, 301; *Hassett* v. *Welch*, 303 U. S. 303, 314.

exists at the time of its decision and that "if, subsequent to the judgment [of the lower court], and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *United States* v. *Schooner Peggy*, 1 Cranch 103, 110. That principle has been followed by this Court in instances where the intervening statute was expressly made applicable to litigation then pending (*Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23) or where the lower court was required to follow state law which was changed pending appeal (*Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538).

But the question here presented is one of statutory construction which must be answered before the principle above set forth has any application. Congress has not specifically declared that the Act should be applicable to pending litigation but has implied the contrary. Nothing in the purpose of the Act requires that it apply to cases which have almost run their full course before the Act was passed; the Act was not designed to unsettle pending litigation, but to set standards for the future. In the absence of a plain declaration that it should be so applied, normal canons of statutory construction require that it operate only in respect of actions to arise subsequent to its effective date, and at least not so as to raise for the first time on review new questions as to the

propriety of previously rendered lower court decisions.[26]

B. The Administrative Procedure Act would not require a different conclusion.

Even if the Act were applicable, the pertinent provision respecting enforcement proceedings is only a restatement of existing law and would require the present questions to be determined, as before, by the provisions of the Agricultural Marketing Agreement Act. The applicable provision is Section 10 (b), which reads in its entirety as follows:

> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> * * * * *
>
> (b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in

[26] In respect of the Government's contention that the Act is not retroactively operative, it will be noted that Section 10 (b) is couched in normal terms of futurity, and in referring to "civil or criminal proceedings" significantly fails to add the commonplace phrase "now or hereafter pending." We need look no further than Section 8a (6) here under consideration for an example of customary draftsmanship when procedural statutes are intended to apply to pending cases. The powers conferred upon district courts to enforce compliance with the Agricultural Marketing Agreement Act are granted "in any proceeding now pending or hereafter brought."

> any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

The Government has shown that Section 8c (15) of the Agricultural Marketing Agreement Act was intended to provide an "exclusive" opportunity for judicial review of the administrative action the respondents seek to challenge in this case.[27] The adequacy of that opportunity would appear to be beyond dispute. The section also provides an opportunity to initiate a review pro-

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[27] In this connection, it is noteworthy that the legislative history of Section 10 (b) clearly negatives any view that the opportunity for judicial review provided by law must be expressly labeled as "exclusive". Both the House and Senate Committees on the Judiciary, in their final reports on the bill which became the Administrative Procedure Act unchanged in this respect, state in identical language: "The exception from 'prior, adequate and exclusive * * * review' in the second sentence is operative only where statutes, *either expressly or as they are interpreted*, require parties to resort to some special statutory form of judicial review which is prior in time and adequate to the case." [Italics added.] S. Rep. No. 752, pp. 26–27, H. Rep. No. 1980, p. 42, 79th Cong., 2d sess.

ceeding "prior" to the institution of an action to enforce the provisions of an order. As soon as a handler concludes that any order, any provision thereof, or any obligation imposed in connection therewith is not in accordance with law he may initiate an administrative proceeding that will culminate in judicial review in the District Court. Since the Government could not bring a suit to restrain violations until after it had ascertained that a handler was not in compliance, the handler plainly will have an opportunity to institute an administrative proceeding before an enforcement proceeding can be commenced.[28] And in this case it is clear that respondents had a "prior opportunity." Their dispute with the Marketing Administrator is clearly of long standing, and, at least from the time of the filing of the original complaint in September 1942 (R. 3),[29] they knew of his claims and could have instituted an administrative proceeding to review the questions raised by the dispute. This is all the "prior opportunity" which Section 10 (b) requires.

It is true that, although in this case it would appear that respondent had ample time in which

[28] In such a proceeding, he doubtless can apply to the Secretary for a stay of the administrative order *pendente lite*. Cf. *Yakus* v. *United States*, 321 U. S. 414, at 438–439.

[29] Before the institution of the suit, the Marketing Administrator had made demands for payment, which respondents had refused (R. 5–6), so that respondents doubtless could have begun review proceedings before the filing of the complaint.

to have instituted and probably even completed an administrative and judicial review of the matter in question before the commencement of the enforcement suit, the Marketing Agreement Act recognizes that situations will arise in carrying out the program which require immediate action, and the Government is authorized to initiate an enforcement proceeding (Section 8a (6)) before judicial review sought by a handler in a Section 8c (15) proceeding has been completed. It should be noted, however, that any judgment of the court enforcing a marketing order is designed primarily to insure the continued operation of the order pending a final determination as to its validity in the review proceeding, and the Act provides that the judgment enforcing the order will be subject to abatement upon completion of judicial review.[30] If review of the order is sought in the manner prescribed by the statute the judgment of enforcement does not differ in substance from an injunction *pendente lite* such as courts commonly grant without first determining the merits of a case. The opportunity afforded a handler to initiate a

[30] Sec. 8c (14) also provides that if in an action brought to invoke the penalties provided by that section the court finds that a petition pursuant to subsection (15) was filed and prosecuted in good faith, no penalty shall be imposed for such violation as occurred between the date upon which the defendant's petition was filed and the date upon which notice of the Secretary's ruling thereon was given to the defendant.

judicial review proceeding as soon as aggrieved and the limitation placed upon any interim enforcement order that may be issued provide a prior opportunity for judicial review within the meaning of the exception in Section 10 (b) of the Administrative Procedure Act. This fully protects the handler.

To construe Section 10 (b) to mean that all defenses may be raised in an enforcement action unless a judicial review proceeding brought by the handler has been concluded (or the handler has been given an "opportunity" to conclude it) prior to the initiation of the suit for enforcement would make effective administration of the Agricultural Marketing Agreement Act impossible. A sufficient number of recalcitrant handlers would be able to prevent the effective operation of marketing orders issued pursuant to the Act, the Government might be unable to enforce compliance with the orders for long periods of time pending the completion of proceedings invoked to test their validity, the carefully prescribed provisions for an administrative remedy and judicial review would be practically nullified because there would be no incentive to proceed under Section 8c (15), and the courts would be burdened with the obligation of determining the many complex and technical questions involved in the administration of milk orders without benefit of the informed judgment and accumulated experience of the specialized forum provided by the Act.

Handlers could completely destroy the administrative procedure specified in the statute by awaiting enforcement suits in which they could raise all defenses without first submitting them to the Secretary. An intention to make such a drastic change in the system established by the Agricultural Marketing Agreement Act should not be ascribed to Congress in the absence of compelling evidence.

Certainly, the legislative history underlying Section 10 (b) negatives any intention on the part of Congress to make such a sweeping change. The Senate Committee on the Judiciary reported that the sentence governing judicial review in enforcement proceedings quoted above "states the present rule as to enforcement proceedings."[31] The sponsor of the bill in the House, in the course of debate immediately preceding the bill's passage, explained that the provisions of Section 10 (b) "summarize the situation as it is now generally understood. The section does not disturb special procedures which Congress has provided * * *" (92 Cong. Rec. 5759).[32] These views accord with those expressed by the Attorney General in re-

[31] The statement appears in the committee print of the bill introduced in the Senate by Senator McCarran on January 6, 1945, which carried with it an explanation of the bill's features.

[32] The Senate debates do not contain any specific reference to the particular language here under discussion. The final Committee reports include only the explanation quoted *supra* at page 50.

sponding to a request for his comments on the bill. He noted that Section 10 (b) "in general declares the existing law concerning judicial review," and with particular reference to the provision in question he stated (S. Rep. No. 752, 79th Cong., 2d sess., pp. 43-44):

> The final sentence of the subsection indicates that the question of the validity of an agency action may arise in a court proceeding to enforce the agency action. The statutes presently provide various procedures for judicial enforcement of agency action, and nothing in this act is intended to disturb those procedures.

Carl McFarland, Chairman of the Committee on Administrative Procedure of the American Bar Association, which actively sponsored the bill, also indicated during the committee hearings that the judicial review provisions of the Administrative Procedure Act were not intended to alter existing law. Hearings before House Committee on the Judiciary, 79th Cong., 1st sess. (1945), *Federal Administrative Procedure*, pp. 37-38.

The first sentence of Section 10 (b) specifically provides that the form of statutory review shall be any special statutory review procedure that may be applicable. It would be unlikely if after this approval in the first sentence of specific methods of review such as are contained in Section 8c (15) of the Marketing Agreement Act, Congress intended the reference in the second

sentence to a prior opportunity for judicial review to nullify that procedure, particularly when such action would jeopardize the administration of the substantive program to which the procedure is applicable. Such a construction is not necessary because the procedural provisions of the two acts can be given a consistent construction.

This conclusion is reinforced by the introductory clauses to Section 10 which qualify all that follows. Section 10 as a whole is applicable "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *". We believe that we have shown that, before the passage of the Administrative Procedure Act, the Marketing Agreement Act was intended to preclude judicial review except in so far as proceedings under Section 8c (15) were concerned. The introductory qualification to Section 10 manifests a legislative intention that such a limitation upon judicial review continue to be recognized. Where Congress has precluded all judicial review, the second sentence of Section 10 (b) does not operate to create review; where Congress has precluded all but a special type of review, that preclusion is reaffirmed by the opening clause of Section 10.

An interpretation contrary to the one urged here might have drastic and incalculable effects on the methods for judicial review of administra-

tive action that Congress authorized in particular instances and specifically declared to be exclusive. It is hard to believe that Congress thus determined in blunderbuss fashion to jeopardize the exclusivity of the various methods of obtaining review that it carefully incorporated in many statutes requiring administration. In particular instances Congress has provided for judicial review of agency action exclusively by the circuit courts of appeals or by the courts of the District of Columbia, or by special statutory three-judge courts, and it is particularly difficult to believe that the considerations which motivated Congress to provide these exclusive methods should not obtain if, fortuitously, the agency found it necessary to bring enforcement proceedings to prevent a statutory program from being impaired or rendered ineffective pending the completion of the process of review.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, with directions to affirm the judgment of the District Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH RUZICKA AND CHARLES RUZICKA, INDIVIDUALLY, AND AS CO-PARTNERS, TRADING AS SEELEY DAIRY
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The District Court entered findings of fact, conclusions of law, order for judgment and final judgment as set forth in the record (R. 117-123). The Circuit Court of Appeals reversed the District Court, the opinion appearing in the record (R. 135-142) and reported 152 F. 2d 167.

JURISDICTION.

Petitioner invokes jurisdiction of this Court by virtue of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), and Rule 38 of this Court.

QUESTION PRESENTED.

Whether the Circuit Court of Appeals was correct in requiring the petitioner, complaining of the respondents under the various provisions of the Agricultural Marketing Agreement Act, to come forward with evidence to prove its allegations which were denied by the respondents in the District Court as the initial forum chosen by the petitioner.

STATUTE AND ORDER INVOLVED.

Action was instituted under provisions of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601, *et seq.*). The petition for writ of certiorari sets forth most of the sections of the Act involved. These sections involved are as follows:

> 8a (6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

The section omitted by petitioner provides for an administrative process by the Secretary of Agriculture prior to the institution of suit under the previous section. The omitted section is as follows:

8a (7) Upon the request of the Secretary of Agriculture it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this chapter. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

The other pertinent sections of the Act are as follows:

8a (8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or thereafter existing at law or in equity.

8a (15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

8a (15) (B) The District Courts of the United States (including the district court of the United States for the District of Columbia) in any district

in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

The Order involved is an executive order of the Secretary of Agriculture promulgated by virtue of the Agricultural Marketing Agreement Act. It is commonly known as Order 41, as amended, regulating the minima prices for milk and milk products in the Chicago, Illinois marketing area. The form relied upon is set forth in the record (R. 43-65). The Order fixes prices for fluid milk based upon various use classifications.

Equalization is sought by a fund into or from which payments or withdrawals are made according to the relative use classification of the products of each dairy. The pertinent section of the Order under which the petitioner sought to collect monies from the respondents in the District Court is the following (R. 61-62):

8 (g) *Adjustments of Errors in Payments.* Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund pursuant to paragraph (d) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer, for milk purchased or received by such handler, discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

Contingencies for errors by the auditors of the market administrator or the parties and disputes over indebtedness are provided for by means of a reserve fund in the Order (R. 60):

7 (b) (5) Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. The result shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants located within the 70-mile zone.[1]

---

1. The appendix in appellee's brief filed in the Circuit Court of Appeals (Appellee's Brief, p. 29) showed a reserve fund on October 31, 1944 of $76,896.16.

STATEMENT.

The record shows that the pricing Order involved became effective September 1, 1939; that since at least that date the respondents operate a dairy in the City of Chicago. Without prior administrative proceedings either by the Secretary of Agriculture under Section 8(a) 7 of the Act or the respondents under Section 8(c) 15 of the Act the petitioner filed an action in the District Court on September 15, 1942 alleging an indebtedness to the equalization fund of the Order. Petitioner alleged "errors in payments * * * have been disclosed by an audit of the defendants' books and records," a billing for indebtedness and non-payment (R. 6). The answer denied indebtedness, disclosure of errors and violation and pleaded affirmatively that the audit was inaccurate (R. 70). No violation of the Order other than indebtedness was alleged.

A supplemental complaint (R. 73) and answer thereto (R. 89) were filed realleging and denying indebtedness for a further period. An affirmative allegation that the billing "was based upon an erroneous, improper, incomplete and inaccurate inspection or audit of the defendants' accounts, books, records and activities of their transactions" was made. Another affirmative allegation, referring to the various administrative proceedings available, was made setting forth that no administrative determination was made by the Secretary of Agriculture prior to the institution of the action (R. 94).

Petitioner has referred to a petition by respondents to stay (R. 95) filed in the District Court. This petition was never ruled upon and was at the request of respondents and with the immediate consent of the petitioner before consideration of the various motions by the District Court

withdrawn from the record (R. 108). Having been withdrawn the petition [2] is not properly a part of the record, either of the trial court or of a reviewing court. *McClellan* v. *Carland*, 217 U. S. 268; *Southern Ry. Co.* v. *Walters*, 284 U. S. 190.

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2. Petitioner has by footnote (Petn. for Cert. p. 12) set forth matters which respondents submit are not properly a part of the record nor statement of the case. If considered however, respondents wish to submit the following as a more complete record of proceedings:

The first petition to the Secretary of Agriculture was filed October 30, 1943. It prayed for a showing by the Secretary of Agriculture of the basis for the amounts of monies claimed in the District Court action. On December 18, 1943 a hearing was denied on the petition for being vague, unsupported in facts.

The second petition was filed May 3, 1944. After a conference with U. S. Department of Agriculture Solicitors this was amended in July, 1944. The petition complained of bills being sent, set forth that no indebtedness existed and requested the Secretary of Agriculture to produce records to substantiate his claims of indebtedness. The solicitors refused to furnish the basis for the bills either at a pre-hearing conference on July 27, 1944, or by the time of the hearing, October 12, 1944. Since the respondents (petitioners there) had no evidence of indebtedness to meet they suggested a continuance.

The hearing officer withheld action until the District Court had entered judgment, October 20, 1944, then on December 12, 1944 dismissed the petition with leave to file an amended petition.

The next petition was filed January 18, 1945, again requesting the basis of the claims of indebtedness. Informal request for the records was made April 2, 1945 to the Market administrator and the solicitors. This was denied.

On May 18, 1945 a written motion was presented to the hearing officer for an order on the market administrator to show the basis of the claims. This was denied.

The District Court granted plaintiff's motion for judgment on the pleadings entering findings of fact, conclusions of law and final judgment order (R. 117). No evidence had been submitted by petitioner, nor were respondents permitted to offer any evidence.

Appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. On October 30, 1945 that Court reversed the District Court remanding the same for trial, holding that petitioner had to prove its allegations of indebtedness and that respondents could avail themselves of any legal or equitable defense under the general powers of the Court. Petitioner's petition for rehearing was denied January 5, 1946 (R. 144).

On May 29, 1945 written motion was presented requesting that the administrative proceeding be held in abeyance until the Circuit Court of Appeals rendered its decision. This was opposed and denied. The respondents (petitioners there) then withdrew their petition under Sec. 8c 15 A of the Act.

SUMMARY OF ARGUMENT.

I.

There is no conflict of law in the two decisions of the Ninth and Seventh Circuit Courts of Appeals.

II.

The Congress did not divest the District Courts of their legal and equitable powers by enactment of the Agricultural Marketing Agreement Act.

III.

The decision below concerns only private as against public rights and is not of a generally important nature as to merit further action by this Court.

ARGUMENT.

I.

There is no conflict of law in the two decisions of the Ninth and Seventh Circuit Courts of Appeals.

Petitioner's brief directs attention to the Ninth Circuit case of *La Verne Co-op. Citrus Ass'n* v. *United States,* 143 F. 2d 415 as a decision in conflict. That case arose in a different manner. An examination of the facts of the two cases indicate these differences:

1. In the *La Verne* case the violation of the order was admitted; in this case violation has been denied.

2. In the *La Verne* case the order fixed quantity shipments of lemons and the defendants admitted shipments in excess. In this case the prices fixed were not attacked but the claim of indebtedness arising by *operation* of the order rather than *existence* of the order has been attacked. Indebtedness has been denied.

3. In the *La Verne* case the handlers had voluntarily instituted and were "actively pursuing" their rights in the administrative process (Sec. 8(c) (15) (B) of the Act.) when they attacked the *desirability* of the order in court. In the instant case the petitioner selected the District Court as the initial forum for the determination of its controversy with the respondents. The *desirability* of the order was not at issue in the Circuit Court of Appeals in the instant case.

Differences in factual situations will give rise quite naturally to differences in legal conclusions. The Circuit Court of Appeals in the instant case reached "a contrary conclusion to that announced in the *La Verne* case," by reason of the different factual basis (R. 141). The test for the granting of certiorari requires divergent conclusions of law upon the same factual basis. *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387 dismissing certiorari. *Sanchez* v. *Borras*, 283 U. S. 798. *Reconstruction Finance Co.* v. *Bankers Trust Co.*, 318 U. S. 163.

Respondents submit that the two decisions of the Circuit Court of Appeals are correct and harmonious. *United States* v. *Carver*, 260 U. S. 482. *American Const. Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372. The fact that District Courts' milk order cases prior to the Circuit Court of Appeals' decision in this case have decided otherwise gives no basis for further appeal since the instant case is the first case on review to be decided on the point.

II.

The Congress did not divest the District Courts of their legal and equitable powers by enactment of the Agricultural Marketing Agreement Act.

Throughout this litigation petitioner has urged that the conferring of additional jurisdiction upon the District Courts under the Act operated to divest the Courts of their normal powers[3]. (Judicial Code, Section 24,

3. "The search for significance in the silence of Congress is too often the pursuit of a mirage. * * * denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 16, 17.

amended, 28 U. S. C. 41). Inherent powers of the District Courts have been recognized and upheld in the two cases involving this issue decided by this Court.

On first-impression this Court recognized the rights of *handlers* to raise an issue in the judicial forum. The issue was recognized and decided *judicially* in an enforcement proceeding.

> "The defendants * * * contend that the bills include in their computation milk plainly excluded by the terms of the Order because the product of dairies without the certificate of registration * * * The explanation of the plaintiff is that the Order covers this milk.
>
> "The Administrator seeks payment on the basis of all milk received by licensed handlers for use in the Marketing area * * *
>
> "As the action of the handlers forms the ground for the initiation of regulation under the Act and for classification, reports, calculation and payment under the Order, *we conclude* that the milk received by handlers for use in the area is the proper basis of computation." *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 600. (Italics supplied).

Courts should be jealous of their powers, guarding them carefully against encroachments operating under the guise of expediency. Arbitration like administrative action may be urged as more expedient but their existence can not preclude jurisdiction in a judicial forum.

This same principle under this Act has recently been again invoked. In *Stark* v. *Wickard*, 321 U. S. 288, 303, 64 S. Ct. 559 (1944) the Court said:

> "The Act bears on its face the intent to submit many questions arising under its administration to judicial review. Secs. 8a (6), 8c (15), (A) and (B). It specifically states that the remedies specifically provided in Sec. 8a are to be in addition to any reme-

dies now existing at law or equity. Sec. 8a (8). This Court has heretofore construed the Act to grant handlers *judicial* relief in *addition* to the statutory review specifically provided by Sec. 8c (15). On complaint by the United States, the handler was permitted by way of defense to raise issues of a want of statutory authority to impose provisions on the handlers which directly affect such handlers. *U. S.* v. *Rock Royal Co-op.*, 307 U. S. 533, 560, 561, 59 S. Ct. 993, 1006, 1007, 83 L. Ed. 1446". (Italics supplied.)

And the Court further guaranteed *judicial* relief, saying:

"With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of a statute bars from the courts an otherwise justiciable issue." *Stark* v. *Wickard*, 321, U. S. 288, 309, 64 S. Ct. 559 (1944).

Petitioner urges that this inherent power be overruled by reason of the administrative process. But the Congress in providing for administrative relief contemplated the co-existing rights of judicial and administrative determination by giving to the handler the option of administrative or judicial relief.

"Any handler subject to an order *may* file a written petition with the Secretary of Agriculture * * * " (Italics supplied 8 (c) (15) (A). The discretionary "may" was chosen rather than the mandatory "shall". A handler is not required by the Act to seek his administrative relief before complaining to a judicial forum as frequently occurs in other Acts of Congress such as Office of Price Administration matters.

Consideration of the entire Act evidences the intent of Congress to grant a handler his choice of forum. The Secretary of Agriculture has his choice of a forum for a determination of an amount due also.

"• • • Whenever the Secretary or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued, pursuant to this title the Secretary shall have the power to institute an investigation and, *after due notice* to such handler, to conduct a *hearing* in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action." Sec. 8a (7) of the Act. (Italics supplied).

The complaint (R. 3) alleges that the action was instituted at the request of the Secretary but the record shows that no prior administrative *hearing* or *determination* of the amount which might be due was held.

The judicial forum was the original forum for determination of the controversy. Questions of indebtedness have since the earliest days of the English court systems been questions of judicial cognizance. Further, the judicial forum was selected by the petitioner. Under its theory any billing, whether correct or incorrect, trivial or tremendous, must be paid in court immediately. Then the handler may proceed to claim its refund through the slow administrative process of petition and appeal[4]. Such a procedure could be ruinous to the business standing and credit of a dairy. The Act provides for no stay of execution or supplemental process after entry of decree of mandatory injunction for payment of monies as has been entered in dairy order cases. The Act only states that the "proceedings • • • shall abate" whenever the administrative process is completed. In the instant case under peti-

4. As to slowness and difficulties of administrative proceedings see footnote on p. 8 herein explaining how market administrator refused to show basis of billing and insisted that handlers had the burden of proving their *own* reports *wrong*.

tioner's theory the respondents must pay immediately all monies claimed regardless of the propriety of the claim. An inequitable forfeiture would result to deny dairies their right to their day in court. Such a construction is patently not justiciable. The decision of the Circuit Court of Appeals stands as a correction of the previous decisions of the District Courts in dairy order indebtedness cases.

III.

The decision below concerns only private as against public rights and is not of a generally important nature as to merit further action by this Court.

Petitioner has suggested that the successful operation of dairy orders requires a review of the case by this Court. On the contrary the success of the operation of an administrative order will increase if market administrators are held to strict proof of their demands for payment. Laws of legislative bodies and courts find their foundation and support in "common sense." Respondents submit that the decision below imports that "common sense" into the law. Business practice and courts have always abided by the principle that a person charging indebtedness and seeking monies must show the indebtedness, if denied. To hold otherwise would be tantamount to a presumption of guilt repugnant to our Constitution.

Questions as to the necessity for or desirability of a food order or an amendment to or correction of the order might properly be argued to be a matter of administrative determination as a quasi-legislative problem. But to hold that the imposition of a financial obligation and the collection thereof is not a judicial problem disregards our

established three branch government. As borne out by the *La Verne* case of the Ninth Circuit, the economic and agricultural *desirability* of an order being an aspect of the promulgation of the order differs inherently in fact and principle from the attempted imposition of a financial responsibility under the operations of an order whose existence is not now attacked.

With the decision in the Circuit Court of Appeals in the instant case on food orders, the Government may now have its administrative determination or a judicial determination at its own election and be prepared to substantiate its claims in either forum.

Conclusion.

In conclusion respondents submit that the decision below is correct, that the case presents no conflict of decisions nor question of general public import.

Respondents respectfully submit that the petition for certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be denied.

WILLIAM PARKER WARD,
Attorney for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No 54

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOSEPH RUZICKA AND CHARLES RUZICKA, INDIVIDUALLY, AND AS CO-PARTNERS, TRADING AS SEELEY DAIRY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

WILLIAM PARKER WARD,
Attorney for Respondents.

November, 1946.

JUDD & DETWEILER, INC., PRINTERS, WASHINGTON, D. C.

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JURISDICTION.

The order of the Circuit Court of Appeals reversing the judgment of the District Court was entered October 30, 1945. The order of the Circuit Court of Appeals denying the petition for rehearing was entered January 5, 1946. The petition for certiorari was filed on March 7, 1946 and certiorari was granted April 22, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., sec. 347).

QUESTION PRESENTED.

Whether under the Agricultural Marketing Agreement Act the District Courts are divested of original jurisdiction to adjudicate a handler's defenses of law and of fact.

STATUTE AND ORDER INVOLVED.

This action was instituted under provisions of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. sec. 601 *et seq.*). The pertinent provisions are as follows:

> 8a (6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.
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> 8a (7) Upon the request of the Secretary of Agriculture it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant

to, this chapter. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

8a (8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or thereafter existing at law or in equity.

8c (15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

8c (15) (B) The District Courts of the United States (including the district court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling

is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this sub-section (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a (6) of this title. Any proceedings brought pursuant to section 608a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

The administrative order involved is an executive order of the Secretary of Agriculture promulgated by virtue of the Agricultural Marketing Agreement Act. The order, commonly called Order 41, fixes the minimum prices to be paid by dairies to farmers for milk sold in the Chicago, Illinois marketing area. Prices are determined accordingly to quantity and quality of sales of milk products.

The form of Order 41 involved herein appears in full in the record (R. 43-65). The pertinent sections of the Order under which petitioners sought to collect monies from respondents in the District Court is as follows (R. 61-62):

8 (g) Adjustment of Errors in Payments. Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund pursuant to paragraph (d) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator

to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer, for milk purchased or received by such handler, discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

The pertinent provision of the Order offsetting errors made by the employees of the agency supervising the operation of the order and disputes over indebtedness is as follows (R. 60):

7 (b) (5) Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. The result shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants located within the 70-mile zone.[1]

[1] The appendix in petitioners' brief filed in the Circuit Court of Appeals (Appellee's Brief, p. 29) showed a reserve fund on October 31, 1944 of $76,896.16.

STATEMENT.

Since this matter is on appeal on the pleadings only a review of the kind and contents of the pleadings is proper. Other matters not contained in the record of the judicial process are not properly a statement of the case.

A complaint was filed in the District Court for the Northern District of Illinois (R. 3), and answer was filed (R. 70). Then supplemental complaint (R. 73) and answer thereto followed (R. 89). Both complaints may be treated as one and both answers as one. All pleadings were verified.

The record of pleadings shows that the pricing Order involved became effective September 1, 1939; that since at least that date the respondents operate a dairy in the City of Chicago. Without prior administrative proceedings either by the Secretary of Agriculture under Section 8(a) 7 of the Act or the respondents under Section 8(c) 15 of the Act the petitioner filed an action in the District Court on September 15, 1942 alleging an indebtedness to the equalization fund of the Order. Petitioner alleged "errors in payments • • • have been disclosed by an audit of the defendants' books and records," a billing for indebtedness and non-payment (R. 6). The answer denied indebtedness, disclosure of errors and violation and pleaded affirmatively that the audit was inaccurate (R. 70). No violation of the Order other than indebtedness was alleged.

A supplemental complaint (R. 73) and answer thereto (R. 89) were filed realleging and denying indebtedness for a further period. An affirmative allegation that the billing "was based upon an erroneous, improper, incomplete and inaccurate inspection or audit of the defendants' accounts,

books, records and activities of their transactions" was made. Another affirmative allegation, referring to the various administrative proceedings available, was made setting forth that no administrative determination was made by the Secretary of Agriculture prior to the institution of the action (R. 94).

Petitioner has referred to a petition by respondents to stay (R. 95) filed in the District Court. This petition was never ruled upon and was at the request of respondents and with the immediate consent of the petitioner before consideration of the various motions by the District Court withdrawn from the record (R. 108). Having been withdrawn the petition[2] is not properly a part of the record, either of the trial court or of a reviewing court. *McClellan* v. *Carland*, 217 U. S. 268; *Southern Ry. Co.* v. *Walters*, 284 U. S. 190.

The District Court granted plaintiff's motion for judgment on the pleadings entering findings of fact, conclusions of law and final judgment order (R. 117). No evidence has been submitted by petitioner, nor were respondents permitted to offer any evidence.

Appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. On October 30, 1945 that Court reversed the District Court remanding the same for trial, holding that petitioner had to prove its allegations of indebtedness and that respondents could avail themselves of any legal or equitable defense under the general powers of the Court. Petitioner's petition for rehearing was denied January 5, 1946 (R. 144).

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[2] Petitioner has by footnote (Petitioner's Brief, p. 12) set forth matters which are not properly a part of the record nor matters for judicial notice. Reviewing court sits in review of record of court below. *McClellan* v. *Carland*, 217 U. S. 268; *Southern Ry. Co.* v. *Walters*, 284 U. S. 190.

SUMMARY OF ARGUMENT.

I.

By the enactment of the Agricultural Marketing Agreement Act of 1937 the Congress did not divest the Federal District Courts of original jurisdiction to determine controversies between the government and handlers. The administrative procedure provided in the Act is cumulative or in addition to the remedies provided by the Judicial Code.

II.

The enforcement jurisdiction invoked under the Agricultural Marketing Agreement Act was improper in view of the adequate remedy at law for the collection of an alleged debt.

III.

The material issues of fact raised by the pleadings precluded the summary disposition of the case by use of motion for judgment on the pleadings.

ARGUMENT.

I.

By the Enactment of the Agricultural Marketing Agreement Act of 1937 the Congress Did Not Divest the Federal District Courts of Original Jurisdiction to Determine Controversies Between the Government and Handlers. The Administrative Procedure Provided in the Act Is Cumulative or in Addition to the Remedies Provided by the Judicial Code.

The principal question before this Court is whether or not the remedies of the administrative process provided by Sections 8 c (15) (A) and 8 c (15) (B) are cumulative or in addition to the remedies provided by the judicial code, 28 U. S. C. 41 (1), or exclusive.

Of initial importance in deciding that question is the Act itself.

1. In chronological order, first appears a section giving to the Government general remedies of *enforcement* of the orders under the Act. This has no counterpart as to relief for handlers, producers, or others who may claim to be adversely affected by an order.

> 8a (6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

2. The next provision chronologically, as if in clarification of possible doubt of a theory of exclusiveness of the

prior section, states that the remedies provided are cumulative and are in addition to such jurisdiction as would exist under the judicial code.

> 8a (8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or thereafter existing at law or in equity.

It will be noted that the cumulative remedies section does not limit or direct the relief to be obtained to any one party or class. The Government, the producers, the handlers, and all others are thereby confirmed in their judicial remedies "provided for elsewhere in this chapter or now or thereafter existing at law or in equity." 7 U. S. C. 608a (8). Congress thereby expressly reaffirmed the rights of litigants to a judicial determination of their controversies even as to present and future additional jurisdiction of courts both at law and in equity.

3. The third section with certain pertinent sections italicized is as follows:

> 8c (15) (A). Any handler subject to an order *may* file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not *in accordance with law* and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, *if in accordance with law.*
>
> 8c (15) (B). The District Courts of the United States (including the District Court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his

principal place of business, are hereby vested with jurisdiction in equity to review such rulings, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling *is not in accordance with law*, it shall remand such proceedings to the Secretary with directions either (1) *to make such ruling as the court shall determine to be in accordance with law*, or (2) to take such further proceedings as, in its opinion, the law requires. *The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter*, instituted pursuant to this subsection (15).

Manifestly, the foregoing provisions must be construed either as (1) containing an exclusive remedy which every aggrieved handler *must* pursue in the first instance to obtain relief, or (2) as granting a cumulative remedy which and aggrieved handler may ignore if he desires relief in the judicial forum.

This Court in an interpretation of these provisions held that the District Courts are not divested of jurisdiction of controversies between handlers and the government. *U. S. v. Rock-Royal Co-op.*, 307 U. S. 533.

In the *Rock-Royal* case which, like the instant case, was an enforcement action by the Government against handlers, this court in its initial consideration, of the Act recognized the jurisdiction of the courts for a judicial determination of a controversy.

"The Government makes the point that none of the defendants, all handlers, can object to these terms of the order * * * Although three of the defendants cannot complain of the benefits conferred upon cooperatives, for they are cooperatives, the defendant Jetter Dairy Company has standing *to raise the issue of want of statutory authority to except cooperative handlers from payment of the uniform price.*" *U. S.* v. *Rock-Royal Co.*, 307 U. S. 533, 560. (Italics supplied.)

At the same time this Court recognized the rights of handlers to raise any issue in the judicial form, and to defend an enforcement action such as involved in the instant case. A *judicial determination* of the issue resulted in the enforcement action.

"The defendants * * * contend that the bills include in their computation milk plainly excluded by the terms of the Order * * *

"As the action of the handlers forms the ground for the initiation of regulation under the Act and for classification, reports, calculation and payment under the Order, *we conclude* that the milk received by handlers for use in the area is the proper basis of computation." *H. P. Hood & Sons* v. *U. S.*, 307 U. S. 588, 560. (Italics supplied.)

In *Stark* v. *Wickard*, 321 U. S. 288, this court upheld the right of producers to enjoin unauthorized action by the Secretary of Agriculture. The Court gave support to the argument that the absence of any restriction as to parties under the comulative remedies section did not operate to divest a party of his right to a judicial determination of a controversy under the Act. The Court has granted judicial relief to a producer complaining of the operations of an Order. The Court said:

"The Act bears on its face the intent to submit many questions arising under its administration to judicial review. Secs. 8a (6), 8c (15), (A) and (B). It specifically states that the remedies specifically provided in Sec. 8a are to be in addition to any remedies now ex-

isting at law or equity. Sec. 8a (8). This Court has heretofore construed the Act to grant handlers *judicial* relief in *addition* to the statutory review specifically provided by Sec. 8c (15). * * *

"With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of a statute bars from the courts an otherwise justiciable issue." *Stark* v. *Wickard*, 321 U. S. 288, 303, 309.

To hold now that in a particular kind of controversy, as here involved, the jurisdiction of the District Courts has been removed would be to contradict the express working of the Act. The cumulative remedies section of the Act makes no exceptions as to particular kinds or class of controversies or parties to controversies. As Congress has power to grant or withdraw jurisdiction of a particular controversy in the absence of an express limitation the courts will be presumed to have full jurisdiction given under the Judicial Code. *Lockerty* v. *Phillips*, 49 F. Supp. 513, affirmed 319 U. S. 182. Jurisdiction being purely statutory, it is from the very essence of our three branch government, to be jealously guarded against encroachments and limitations. *Goldstein* v. *Groesbeck*, 42 F. Supp. 419, rev. on other grounds 142 F. 2d 422, cert. den., 323 U. S. 737. Where Congress by special act has removed jurisdiction, such a limitation will be respected.

"The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination." *Seligmans* v. *U. S.*, 30 F. Supp. 895.

In the instant case the record reveals that no prior administrative action occurred. No determination of violation or indebtedness was made under the administrative process. The District Court was the initial forum.

The administrative remedy provided by Congress broadens the right of handlers and affords by the very wording of the section an election of remedies.

> "Any handler subject to an order *may* file a written petition with the Secretary of Agriculture * * *" 8c (15) (A). (Italics supplied.)

The contention that the handler is excluded from his day in court is without merit for such a construction is manifestly contrary to the express wording selected by Congress.

In *U. S.* v. *Ranes*, 48 F. 2d 582 (C. C. A. 9) the Court stated:

> "Sec. 66 11 8c *supra* provides that 'the applicant may apply to the district court * * * for a review of such order or decision of the commission.' 'May' in its ordinary sense, means that which is permissive not mandatory."

The wording has recently been the subject of litigation in this Court under practically the same point of exhaustion of administrative remedies.

In *Moore* v. *Ill. Central R. Co.*, 312 U. S. 630, this Court in considering the failure to exhaust administrative remedies under the Railway Labor Act, 45 U. S. C. 151 *et seq.* said:

> "* * * But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court * * * It is to be noted that the section pointed out, Sec. 153(i), as amended in 1934, provides no more than that disputes 'may be referred * * * to the * * * Adjustment Board * * *' It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to

> the designated Adjustment Board by the parties, or by either party * * *' This difference in language substituting 'may' for 'shall,' was not, we think, an indication of a change of policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934 indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge."

In the *Moore* case the party seeking the aid of the Federal Court under the election of remedies theory was the moving party, seeking initial relief. In the instant case the government as moving party made its election of the judicial forum and now seeks to further elect or choose for the handlers their forum for relief over the same controversy.

The argument that if "shall" had been used, a handler would perforce have to adjudicate all matters in the administrative forum even though no controversy existed falls, for if Congress had chosen "shall" the addition of "if the handler feels aggrieved" would have corrected the possible confusion.

> "* * * The idea which is now sought to be read into the grant by Congress * * * is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of

the thing as an ordinary man has a right to rely on ordinary words addressed to him." *Addison* v. *Holly Hill*, 322 U. S. 607, 617, 618.

Other sections of the Act nullify the ruling suggested by the Government. The provision that the decree in the enforcement action "shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)," 6 c 15 (B), invites other inconsistencies and wrongs under the government's suggestion.

Abatement generally means a temporary cessation subpect to revival. Story Eq. Pl. Sec. 354, 3 Bla. Comm. 301. The cessation being complete, not partial, would hardly be urged to apply for a mandatory injunction for monies allegedly due. The decree would never be final if the Secretary had for example determined administratively that no funds were due from the handler although the original decree in the enforcement proceeding mandatorily enjoined non-payment of a substantial sum for no judicial review under 15 (B) would follow the Secretary's determination.

Further, nowhere in the Act is any restriction placed upon the government to prevent an enforcement of the mandatory injunction such as granted in various District Court cases and in one Circuit Court of Appeals case, *U. S.* v. *Adler's Creamery*, 110 F. 2d 482, for the payment of monies allegedly due but denied by the handler. Assuming a market administrator contended a sizable sum of money was due from a handler he could proceed to full collection, under the government's theory, before a determination could be made through the administrative hearing on appeal. And the Act not only permits but expressly authorizes prompt collection of the decrees.

"* * * The pendency of proceedings instituted pur-

suant to this subsection (15) shall not *impede, hinder, or delay* the United States or the Secretary of Agriculture * * *" 8 (c) (15) (B). (Italics supplied.)

To justify such a theory would disregard principles of equity such as abhorrence of forfeiture, and balance of equities, as well as taking of property without due process of law as guaranteed by the Fifth Amendment to the Constitution.

Further, a claim of a sizable amount of monies would, as a practical business proposition, be ruinous to business standing and credit, as well as cloud all real estate of a handler.[1] It is not for the courts to assume that a litigant, government or private, would yield some of its rights especially in serious contests where as here the government contends a handler has not even his day in court.

No comparable stay of a collection of a decree or restraint of entry of a decree for money rests in the Act to give comfort to the theory of the Government. The mere fact of the issuance of an injunction of any sort stigmatizes and injures the defendant as having done or threatened to do some illegal or inequitable act of such unusual nature as to justify the extraordinary relief of injunction. *Lenroot* v. *Interstate Bakeries Corporation*, 55 F. Supp. 234, affirmed in part—reversed in part, 146 F. 2d 325; *Leonardo* v. *Leonardo*, 145 F. 2d 849.

A further incongruous situation under the Government's theory will result in that even the enforcement decree does not finally abate unless the controversy be "between the same parties." All enforcement actions are brought in the name of the United States[1] while all review actions

[1] Decree operates as a lien on real estate equivalent to a state court judgment. 28 U. S. C. 812. *Reconstruction Finance Corp.* v. *Maley*, 125 F. 2d 131.

[1] *U. S.* v. *Rock-Royal Co-op.*, 307 U. S. 533; *U. S.* v. *Wrightwood Dairy*, 315 U. S. 110; *U. S.* v. *LaVerne Co-op.*, 143 F. 2d 415.

are against the personal name of the then acting Secretary of Agriculture.[2] (By virtue of a provision of the order the "market administrator may maintain a suit in his own name against any handler for the collection of such handler's prorata share of expense * * *" 941.9 (b) (R. 62). As to such a claim the parties again would not be the same.) Possibly no termination would ever be achieved if abatement hinged upon a "final decree" between the same parties.

To correct all of these possible mistakes and errors an assumption of practice, or future conduct or judicial construction is required. The express wording of the statute clearly solves all problems immediately without strained and ambiguous interpretations.

While an Act and an order thereunder may pass the constitutionality tests as to a particular section or phrase of the enactment, the operation of that Act or order may not be proper. In the instant Act the operation can be constantly challenged by litigants as being unconstitutional as a denial of due process of law in the manner of operation.

If the theory announced by the Government herein should be adopted, all questions concerning the operation of the order are excluded from the courts and delegated to the administrative forum for determination. This includes all questions of law, obviously an unconstitutional delegation. Under 15 (A) the handler who entertains a controversy with the Government over an order must take his grievance to the Secretary of Agriculture "* * * stating that such an order * * * is not *in accordance with law* * * *." Thus questions *of law* would perforce be submitted

[2] *Stark* v. *Wickard*, 321 U.S. 288; *Queensboro Farms Products* v. *Wickard*, 137 F. 2d 969; *Wawa Dairy Farms* v. *Wickard*, 149 F. 2d 860.

to an administrative agency *to the exclusion of the courts*, except on appeal.

The Act continues "* * * after such a hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if *in accordance with law.*" The Secretary is delegated thereby the task of deciding pure questions of law. The review section to correct actions of the Secretary only exists to affirm or reverse the legal ruling in an appellate capacity. Such procedure clearly is repugnant to the constitution.

In the case of *People* v. *Bruner*, 343 Ill. 146, the constitutionality of a statute enacted in 1827 was attacked. This Act provided that "Juries in all cases shall be the judges of the law and fact." The Supreme Court of Illinois, following and adhering to the decision of *United States* v. *Battisto*, 2 Sumner, 240, *United States* v. *Morris*, 1 Curtis 23, and *Sparf and Hansen* v. *United States*, 156 U. S. 51, held that at common law a jury is the judge of facts and *not of the law*, and that the judiciary is the judge of the law.

Section 1 of Article III of the Constitution of the United States, vests the judicial power in a Supreme Court and certain subordinate courts.

The Illinois Supreme Court, at page 158 of the official report of the *Bruner* case, defined "judicial power" thusly:

> "The interpretation of Statutes, the determination of their validity, and the application of the rules and principles of the common law, among others, are inherently judicial functions. The constitution vested these functions in the courts created and authorized by it. (*Commonwealth* v. *Anthes*, 71 Mass. 185; *State* v. *Wright*, 53 Me. 328.)"

At page 159 of the official report, the Illinois Court quoted at length from Justice Harlan's opinion in the

case of *Sparf and Hansen* v. *United States*, 156 U. S. 51, pages 101-103 on the point that the Courts are the sole judges of the law and to hold otherwise would cause the utmost confusion in the law.

The same confusion thus described by Justice Harlan may exist where an administrator or administrative board is given the exclusive right to determine whether an Order, or provision thereof, issued under the Agricultural Marketing Agreement Act of 1937 is in "accordance with law." He is given the right by Section 15A to determine what the law is or should be. That delegation of judicial power to a member of the executive branch of the Government encroaches upon and invades the powers of the Court and hence, violates the provisions of Section 1 of Article III of the Constitution of the United States.

In the case of *United States* v. *Sugar*, 243 Fed. 423, District Court Judge Tuttle (D. C. Mich.), discussed the separation of powers in our government and noted that only the courts may decide what the law is.

It has been held that it is not an unwarranted delegation of judicial power to allow a board in control of marketing of milk to designate the limits of an area or to fix prices therein. *Franklin* v. *Alabama State Milk Control Board*, 232 Ala. 637, 169 So. 295. But whether a price fixed amounts to a confiscation of private property can be determined only by the courts. *Muller Dairies* v. *Baldwin*, 274 N. Y. S. 975, 978, 242 App. Div. 296. In the latter case, the Supreme Court of New York, Appellate Division, said:

> "The fixing of prices, like the fixing of rates or fares, is a legislative function, and here it was delegated to the milk control board. Whether the prices fixed by the board amounted to confiscation of petitioner's property was a judicial question for the courts. *Trustees of Village of Saratoga Springs* v.

Saratoga Gas, Electric Light and Power Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, 14 Ann. Cas. 606."

Cooley's Constitutional Limitations, (8 Ed.) Vol. 2, page 863, states that one "Cannot be bound by a delegated exercise of judicial power, whether the delegation be by courts or by legislative act devolving judicial duties on ministerial officers."

Under the well known rule that courts will uphold the constitutionality of a statute wherever possible, the word "may" must be construed as permissive in order to reach a conclusion of constitutionality, if such construction leads to constitutionality.

To view the *LaVerne* case, *LaVerne Co-op. Citrus Association* v. *U. S.*, 143 F. 2nd 415, concerning which the Circuit Court of Appeals in the instant case announced that a decision contrary to that was reached, reveals an example of the unlawful delegation of authority resulting from a denial of judicial relief to handlers. The Circuit Court of Appeals for the 9th Circuit referred to the Secretary of Agriculture for determination by him as a matter of law such purely legal and constitutional matters as (1) deprivation of property without due process of law violating the fifth Amendment, (2) irreparable injury, and (3) arbitrary and discriminatory classification. Such matters were patently for judicial cognizance. It may well be concluded that the decision of the Circuit Court of Appeals in the *La Verne* case is in itself unconstitutional.

Other Acts of Congress which have been submitted to tests and interpretations by the courts are of little value for no other Act contains similar jurisdictional authorizations to the judicial and administrative forum.

Most similar Act is the Railway Labor Act, 45 U. S. C. 151, *et seq.*, which offers an election of remedies to an

employee sustaining personal injuries. There, as previously pointed out, the employee *may* proceed administratively or judicially. Even if the administrative forum is selected the employee *may* file suit in court to enforce an order of the board and such action "shall proceed in all respects as other civil suits." 45 U. S. C. 153(p).

Watson v. *Missouri K. T. R. Co.*, 17 S. W. 2d 357.
Tunstall v. *Brotherhood*, 323 U. S. 210.
Steele v. *L. and N. R. Co.*, 323 U. S. 192.

The other Acts of Congress under which administrative process ensue generally may be divided into two classes: (1) those which, in creating the administrative process, make it the exclusive remedy, and (2) those which are silent as to the exclusiveness of the administrative process or judicial review.

1. As to those Acts expressly making the administrative process exclusive the courts have held litigants to that procedure. *Yakus* v. *U. S.*, 321 U. S. 414; *Myers* v. *Bethlehem Corporation*, 303 U. S. 41; *Wallace Corp.* v. *N. L. R. B.*, 323 U. S. 248; *Columbia Broadcasting Co.* v. *U. S.*, 316 U. S. 407; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381; *Illinois Commerce Commission* v. *Thompson*, 318 U. S. 675.

A line of cases construing such acts as make the administrative review exclusive still adheres to the general jurisdiction of the District Courts under the judicial code. Thus in *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 282, this Court said:

> "Despite the failure to apply for a rehearing, the court had jurisdiction to entertain this suit. • • • Whether it would have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of judicial discretion. We cannot say that, in denying the motion to dismiss, the discretion was abused."

In that case the railroad was the *instigator* of the action, *selected* the forum, then *before exhausting* the administrative process, sought the jurisdiction of the District Court. This Court reaffirmed the inherently judicial power and discretion for relief.[1]

Further support of the doctrine comes from the holding by this Court that Congress cannot authorize a deprivation of liberty without due process of law by the device of making the fact findings of an administrative board conclusive upon the courts. *Bridges* v. *Wixon*, 144 F. 2d 927, reversed 326 U. S. 135. There this Court held that the sole evidence underlying the determination having been improperly admitted, the finding was unfounded and the judiciary could reverse the action of the board by rejecting the findings of fact.

2. As to statutes which are silent as to the exclusiveness of the administrative process or do not provide for a judicial review the Selective Service Act of 1940, 50 U. S. C. appendix, offered an opportunity for judicial interpretation.

The *Falbo* v. *U. S.*, 320 U. S. 549, case, holding that no judicial review was available where Congress had not authorized a review has been superseded by the recent *Estep* v. *U. S.*, 327 U. S. 114, decided by this Honorable Court. There the registrant exhausted his administrative remedy, then, in a prosecution was allowed to defend on the basis of lack of jurisdiction in the local board (administrative forum) by failure of the board to follow the rules and regulations.

[1]See also *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300 holding the granting of injunctive relief before exhaustion of administrative remedy to be within judicial discretion. And see *American Power & Light Co.* v. *S. E. C.*, 325 U. S. 385, holding that any interested person may seek judicial review of a Securities & Exchange Commission determination although not a party to that determination.

In a concurring opinion the following concise doctrine appears.

> "* * * Before a person may be punished for violating an administrative order due process of the law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights. A court having jurisdiction to try such a case has a clear, inherent duty to inquire into these matters so that constitutional rights are not impaired or destroyed. Congress lacks any authority to negative this duty or to command a court to exercise criminal jurisdiction without regard to due process of law or other individual rights. To hold otherwise is to substitute illegal administrative discretion for constitutional safeguards. As this Court has previously said, 'Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.' *St. Joseph's Stock Yards Co.* v. *United States*, 298 U. S. 38, 52."

By reason of the express language of Congress granting additional administrative relief at the handler's election and by reason of the resultant unconstitutional delegation of judicial powers under the forced construction urged by the Government, the answer to the principal question of this case is that the handlers' remedies are cumulative and not exclusive.

II.

The Enforcement Jurisdiction Invoked Under the Agricultural Marketing Agreement Act Was Improper in View of the Adequate Remedy at Law for the Collection of an Alleged Debt.

A second important question is whether under the Act the government properly sought injunctive relief for the collection of monies allegedly due.

In spite of special grants of injunctive relief to the government such extraordinary relief will be awarded only upon the necessary showing under established principles of equity practice.

> "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocable statement of its purpose would have been made * * *. We are dealing here with the requirements of equity practice with a background of several hundred years history * * * the historic injunctive process was designed to deter, not to punish * * *. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." *Hecht Company* v. *Bowles*, 321 U. S. 321, 329.

In the foregoing case an injunction under the Emergency Price Control Act was denied the government. The instant case presents no express authorization from Congress for punitive action of an equity decree for collection of a debt. Since there is no recourse by way of damages against the United States in favor of a handler who, under the government's interpretation of the Act, is subjected to the decree in an enforcement proceedings while he

establishes the lack of a debt, all caution should be exercised in entry of a mandatory injunction. *U. S.* v. *Taystee Baking Co.*, 55 F. Supp. 490, *Lenroot* v. *Interstate Bakeries Corporation*, 55 F. Supp. 234, affirmed in part and reversed in part, 146 F. 2d 325.

The fundamental doctrines of equity, irreparable injury, balance of equities, he who seeks equity must do equity, equity abhors a forfeiture and adequate remedy at law, all prevail for consideration by the chancellor as strongly when the government seeks relief as a private party. *U. S.* v. *Belt*, 47 F. Supp. 239, vacated 319 U. S. 521, affirmed 142 F. 2d 761, *U. S.* v. *Detroit T. & L. Co.*, 200 U. S. 321.

The only actual relief sought by the government is the collection of a disputed debt. Upon this theory the government contends that the order, Order 41, was violated and extraordinary relief beyond all relief available to it in courts of law should be granted. An analysis of the order involved indicates that some *sixteen* different operations or tasks are required of the handlers whereas the only actual "violation" here involved was the failure to pay an *additional* amount to the pool beyond that which the records of the dairy indicated was due and was paid.

The express wording of the order does not require payment within five days for errors disclosed by certification of *reports* but only disclosed in *payments* made.

> "941.8 (g) * * * Whenever verification by the market administrator of *reports* or *payments* of any handler discloses errors made in *payments* to the producer-settlement fund * * *." (Italics supplied.)

Verification of both is provided but payment for errors is limited.

There is nothing in the Act to vest in the market administrator a presumption of correctness in his and his aids'

duties. Congress has not so changed the rules of evidence as to imbue the audit of the market administrator with even a rebuttable presumption of correctness and the defendants in their answer affirmatively alleged the audit was erroneous, improper, incomplete, and inaccurate. (R. 71).

So strongly has Congress established the principle of withdrawal of equitable relief if an adequate remedy at law exists, the inherent principle has been codified.

> "Suits in equity shall not be maintained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law." 28 U. S. C. 384. Judicial Code 267.

Chancery should not have been appealed to in the instant case until the government as an alleged creditor had exhausted all its remedies at law. An action of debt would suffice. Sound discretion of the chancellor in a controversy of this type would have denied extraordinary relief. *U. S.* v. *Morgan*, 307 U: S. 183; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168.

No case under the Agricultural Marketing Agreement Act has been decided on the issue of adequacy of the legal remedy for the collection of a disputed debt. In the first Adler's Creamery case; *U. S.* v. *Adler's Creamery*, 107 F. 2d 987 in the Circuit Court of Appeals the court reiterates the rule that usual equitable problems are still to be considered even under the enforcement section of the Act. The second Adler's Creamery case, *U. S.* v. *Adler's Creamery*, 110 F. 2d 482, disposed of the contention that equity could not be used to collect a debt past due. Where money alone is sought, equity jurisdiction is expressly removed by the judicial code in favor of jurisdiction at law.

The instant case reveals that a jury demand as to the trial of the material issue of indebtedness remained unheeded (R. 115). The harm to a handler is unwarranted.

III.

The Material Issues of Fact Raised by the Pleadings Precluded the Summary Disposition of the Case by Use of Motion For Judgment on the Pleadings.

Indebtedness being the gist of the controversy in the District Court the issue thereof required a trial according to customary rules of procedure. Complaints alleging indebtedness and answers denying indebtedness all verified raised such a triable issue of fact that the government's motion for judgment on the pleadings was improper. The denials of the answers will be taken as true. *Beal* v. *Missouri Pac. R. R. Corp.*, 312 U. S. 45. *U. S.* v. *Alpha Portland Cement Co.*, 242 Fed. 978.

A mere denial if sufficient will not be inquired into. Extraneous facts cannot be considered. *Ream* v. *Callahan*, 42 F. Supp. 951, affirmed 136 F. 2d 194.

The handler for the reasons stated should have been granted a trial on the issues with opportunity for evidence to be presented by the government and the handlers.

Conclusion.

The respondents respectfully submit that for the reasons stated the judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM PARKER WARD,
Attorney for Respondents.

November, 1946.

SUPREME COURT OF THE UNITED STATES

No. 54.—October Term, 1946.

United States of America, Petitioner, v. Joseph Ruzicka and Charles Ruzicka, Individually, and as Co-Partners, Trading as Seeley Dairy.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 16, 1946.]

Mr. Justice Frankfurter delivered the opinion of the Court.

We brought this case here, 327 U. S. 776, because it raises questions of importance in the administration of the Agricultural Marketing Act of 1937. 50 Stat. 246, 7 U. S. C. § 601 *et seq.* The general scheme of the Act and its operation have been before us in a series of cases. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110; *Stark* v. *Wickard*, 321 U. S. 288. Our immediate concern is with the provisions of the Act that distribute enforcing authority between the courts and the Secretary of Agriculture. These become relevant to the enforcement of Milk Order No. 41, an "Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area", and more particularly the portion of that elaborate Order which defines the rights and obligations of "handlers" of milk. Section 941.1 (5). The Order was issued under the powers delegated to the Secretary of Agriculture to effectuate the purposes of the Act. Section 8c of the Act.

Order No. 41 classifies milk received into the Chicago area according to its uses. To milk in each of the four

classes the market administrator assigns a uniform "use value." All handlers are required to report to the market administrator the quantity of milk purchased and put to its classified uses. On the basis of these reports the administrator, taking into account the total quantity of milk produced and the amount devoted to each classification, as well as the balance in the Producer-settlement Fund, and making authorized adjustments, announces monthly a uniform minimum price to be paid by handlers to producers. Since a handler's receipts from the re-sale of milk, or the sale of milk products, vary with the amount of the milk distributed in each class, the uniform price paid by handlers will create inequities unless adjustment is made, based on the comparative use value of the milk distributed by a particular handler. The mechanism for adjustment is the Producer-settlement Fund. Handlers are required to contribute to this Fund whenever the use value of the milk handled by them during the month is greater than the norm on which the uniform price is based. Conversely, handlers whose milk distribution is of low use value and whose fixed minimum costs are therefore out of line with their receipts, are recompensed from this Fund. Effective enforcement of such a marketing scheme rests on proper accounting, reliable reports and alert inspection. At best, however, errors are inevitable, which may call for payments by handlers into the Fund. The reliance of the industry upon that Fund makes prompt payments into it imperative.

An order for payment into the Fund and its resistance led to this litigation. The Ruzickas, handlers of milk, filed with the market administrator required reports and received from him a transcript of their account with the Fund for the period in controversy. Deficiencies were disclosed which the Ruzickas refused to pay, in disregard of § 941.8 (e) and (g) of Order 41 requiring a handler to pay within five days "the amount so billed". Under § 8a (6)

of the Agricultural Marketing Agreement Act this suit was begun in the Northern District of Illinois for enforcement. The Government prayed for a mandatory injunction commanding compliance with Order 41 by payment of the sums alleged to be due to the Fund. If it be relevant, it was not alleged that there was danger of irreparable loss because of insolvency of the Fund. By their answer the Ruzickas justified their failure to pay, chiefly on the ground that the demand was based upon faulty inspection of their accounts and improper tests of their milk and milk products. The District Court ruled that "the defendants having failed to avail themselves of the administrative remedy provided by said Act, may not raise such issues of fact before this Court". On the issue in the suit thus limited, the District Court granted the Government's motion for judgment on the pleadings. The Circuit Court of Appeals for the Seventh Circuit, one judge dissenting, reversed the District Court, ruling that the validity of the demand by the Secretary of Agriculture may be contested in an enforcement proceeding under § 8a (6). 152 F. 2d 167.

Thus the question before us is whether a handler may resist a claim against him by the Secretary of Agriculture, made according to the procedure defined in the Act, without previously having sought to challenge the claim in a proceeding, also defined in the Act, before the Secretary of Agriculture. The answer is found on a fair reading of the Agricultural Marketing Agreement Act in the context of its purposes and of the scheme designed by Congress for their realization.

The sections of the statute directly relevant to our problem are set out in the margin.[1] Briefly, the district courts of the United States are "vested with jurisdiction specifi-

[1] "8a (6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and

cally to enforce" orders issued pursuant to the Act.[2] The Act authorizes a handler to challenge before the Secretary of Agriculture his order "or any obligation imposed in connection therewith" as "not in accordance with

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restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

8c (15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

8c (15) (B) The District Courts of the United States (including the District Court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this sub-section (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

[2] Section 8a (8) is also invoked by petitioner. But that section adds to the Government's remedies. It implies no judicial review in favor of handlers.

law", and to ask to have it modified or to be exempted from it. When the order is so challenged, the determination of the Secretary of Agriculture, after hearing, is final but only "if in accordance with law". Section 8c (15) (A). To test whether such ruling is "in accordance with law" the handler may bring the Secretary's action for review before the appropriate district court. Section 8c (15) (B). But the very subsection, (15), which gives the handler access to the Secretary of Agriculture for administrative relief and opportunity for judicial review of his determination, provides that the pendency of the proceedings before the Secretary, or in the district court to review the Secretary's ruling, "shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief" under § 8a (6). It is only when "a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)" that proceedings brought for enforcement under § 8a (6) "shall abate". Section 8c (15) (B).

To be sure, Congress did not say in words that, in a proceeding under § 8a (6) to enforce an order, a handler may not question an obligation which flows from it. But meaning, though not explicitly stated in words, may be imbedded in a coherent scheme. And such we find to be the provisions taken in their entirety, as a means for attaining the purposes of the Act while at the same time protecting adequately the interests of individual handlers.

The procedure devised by Congress explicitly gave to an aggrieved handler an appropriate opportunity for the correction of errors or abuses by the agency charged with the intricate business of milk control. In addition, if the Secretary fails to make amends called for by law the handler may challenge the legality of the Secretary's ruling in court. Handlers are thus assured opportunity to establish claims of grievances while steps for the protection

of the industry as a whole may go forward. Sections 8a (6) and 8c (15) thus form a complementary procedural scheme. Contrariwise, it would make for disharmony to extrapolate from these provisions of the statute the right to consider independently, in a proceeding by the Government for the enforcement of the Secretary's order, questions for which Congress explicitly furnished the handler an expert forum for contest with ultimate review by a district court.

The situation before us indicates how disruptive it would be to allow issues that may properly come before a district court in a proceeding under § 8c (15) to be open for independent adjudication in a suit for enforcement under § 8a (6). After a presumably careful study by those technically equipped, a program was devised for the dairy farmers in one of the large areas of the country. The success of the operation of such Congressionally authorized milk control must depend on the efficiency of its administration. Promptness of compliance by those subject to the scheme is the presupposition of Order No. 41. Thus, definite monthly deadlines are fixed by the Order for every step in the program. In large measure, the success of this scheme revolves around a "producers" fund which is solvent and to which all contribute in accordance with a formula equitably determined and of uniform applicability. Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements. To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we here find. That Congress avoided such hazards

for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance. It thereby safeguarded individual as well as collective interests. In the case before us, administrative proceedings were instituted before the Secretary of Agriculture and, apparently, are awaiting his action. Presumably the Secretary of Agriculture will give the respondents the rights to which Congress said they were entitled. If they are dissatisfied with his ruling, they may question it in a district court. The interests of the entire industry need not be disturbed in order to do justice to an individual case.[3]

It is suggested that Congress did not authorize a district court to enforce an order not "in accordance with law". The short answer to this rather dialectic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has

[3] "During the period while any such petition is pending before the Secretary and until notice of the Secretary's ruling is given to the petitioner, the penalties imposed by the act for violation of an order cannot be imposed upon the petitioner if the court finds that the petition was filed in good faith and not for delay. The Secretary may, nevertheless, during this period proceed to obtain an injunction against the petitioner pursuant to section 8a (6) of the Agricultural Adjustment Act. . . . It is believed that these provisions establish an equitable and expeditious procedure for testing the validity of orders without hampering the Government's power to enforce compliance with their terms." S. Rep. No. 1011, 74th Cong., 1st Sess., p. 14.

provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts. Congress seems to have emphasized the different functions in the enforcement of the Act that § 8a and § 8c serve by explicitly directing that the proceedings for relief instituted by a handler under § 8c shall not "impede, hinder, or delay" enforcement proceedings by the United States under § 8a.

We are dealing here solely with the rights of handlers. This is not *Stark* v. *Wickard*, 321 U. S. 288. In that case it was concluded that since Congress had provided no administrative remedy for a producer to review the legality of an order against him, presumably the courts were not closed to him. But by § 8c (15) Congress has made precisely such provisions for handlers. As to them the procedural scheme is complete.

The Agricultural Marketing Agreement Act is one of many enactments by which Congress in regulating economic enterprise has divided the duty of enforcement between courts and administrative agencies. But there is the greatest variety in the manner in which Congress has distributed this responsibility. Those who are entitled to speak tell us that "development of the natural sciences has often suffered from premature generalization. Certainly the recent growth of administrative law counsels against generalizations regarding what is compendiously called judicial review of administrative action. And so we deem it desirable, in a case like this, to hug the shore of the precise problem before us in relation to the provisions of the particular Act immediately relevant. One general observation, may, however, be permitted. Both courts and administrative bodies are law-enforcing agencies, utilized by Congress as such. In construing the enforcement provisions of legislation like the Marketing

Act, it is important to remember that courts and administrative agencies are collaborative "instrumentalities of justice", and not business rivals. See *United States* v. *Morgan*, 307 U. S. 183, 191; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141 *et seq.* And so we are not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit such as was here brought by the United States for the enforcement of an order under § 8a. We say this because it appears that at a stage in the proceedings in the district court a motion for a stay, pending disposition of the petition by the Ruzickas before the Secretary of Agriculture, was made by the respondents. With the court's leave, this motion was subsequently withdrawn. The power of the district court to have acted on it is therefore not before us. Compare *Scripps Howard Radio* v. *Comm'n*, 316 U. S. 4; *Hecht Co.* v. *Bowles*, 321 U. S. 321.

Judgment Reversed.

MR. JUSTICE DOUGLAS concurs in the result.